

K.M. Maregowda Vs. Seven Hills Ex-import Corporation

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Court : Karnataka

Decided On : Jul-26-2004

Reported in : 2005(1)ALD(Cri)13; 2004CriLJ4119

Judge : S.B. Majage, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142; [Partnership Act, 1932](#) - Sections 5 and 12; [Powers of Attorney Act, 1882](#) - Sections 2; Code of Criminal Procedure (CrPC) , 1974 - Sections 200

Appeal No. : Criminal Petn. No. 392 of 2004

Appellant : K.M. Maregowda

Respondent : Seven Hills Ex-import Corporation

Advocate for Def. : K.R. Anantha Murthy, Adv.

Advocate for Pet/Ap. : M.R. Rajagopal, Adv.

Disposition : Petition rejected

Judgement :

ORDER

S.B. Majage, J.

1. In this petition, following points arise for consideration:

(1) Whether a complaint for offence under Section 138 of N.I. Act, not signed by the complainant, could be entertained?

(2) Whether a Power of Attorney Holder of the complainant can file complaint in his capacity as power of attorney holder?

(3) Whether examination of Power of Attorney Holder of complainant on oath satisfies the requirements of Section 200 of Cr.P.C.?

2. The respondent-complainant filed a complaint before the Court through its Power of Attorney holder for an offence punishable under Section 138 of N. I. Act, under the signature of Power of Attorney Holder. After taking cognizance, the Power of Attorney Holder was examined upon oath by the learned Magistrate and thereafter, process was issued. Challenging the same, the petitioner accused is before this Court.

3. After notice to the respondent-complainant, with consent of both sides, taken the matter for final hearing and heard both sides.

4. It was vehemently argued for the petitioner-accused that in view of Section 142 of N. I. Act, complaint filed by the complainant through Power of Attorney Holder, that too, without the signature of the complainant to it, was not at all proper and, that recording of sworn statement of the General Power of Attorney Holder cannot be taken as examining the complainant on oath by learned Magistrate envisaged under Section 200 of Cr.P.C. and consequently, the proceedings require to be quashed.

On the other hand, it was submitted for the respondent complainant that there is nothing wrong in the complaint or in the procedure adopted by the learned Magistrate in recording the sworn statement of the Power of Attorney Holder, through whom the complaint was filed by complainant - a firm under the signature of the Power of attorney holder representing the firm. Perused the records carefully.

5. For the first argument that complaint, being not signed by the complainant, was not tenable, reference can be had to Section 142 of the N. I. Act. According to it,

complaint requires to be made in writing by the payee or the holder in due course and not that, complaint made in writing by the payee, 'be signed' by the complainant-payee or holder in due course of the cheque, as the case may be. The omission of the words 'and signed' in said section appears to be with some purpose and deliberate. Because a payee or holder in due course of cheque i.e., a complainant need not be a natural person as complainant could be a juristic person or a body corporate, etc., who cannot sign, though could be represented by a natural person. That is why said section does not say that the complaint 'be signed' by or be made 'under the signature' of the complainant.

6. The only two requirements or eligibility criteria prescribed by Section 142 of the Act are : The complaint must be by a payee or the holder in due course of the cheque and it must be in writing, as is clear from Section 142(a) of the Act, reproduced below :

'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 under Section 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.'

7. In the case of M. M. T. C. Ltd. v. Medchl Chemicals, : 2002 CriLJ266 , the Supreme Court has observed thus :

'..... In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant-Company'.

In the case on hand also, the complaint is in the name of and by the payee namely, the firm and it is in writing and as such, the two eligibility criteria prescribed by Section 142(a) of the Act are fulfilled.

8. Of course, in the case of S. P. Sampathy v. Manju Gupta 2003 (1) DCR 88 : (2002 Cri LJ 2621), a Division Bench of the High Court of Andhra Pradesh has held that when the law demands that complaint should be in writing by the payee,

it means that the complaint should be made 'and signed' by the payee or the holder in due course. But, said view cannot be said to be correct when the decision in the case of M. M. T. C. Ltd. (supra), is kept in mind with the absence of words 'and signed' in Section 142(a) of the Act.

9. It is trite that while constituting a mandatory provision prescribing eligibility criteria, nothing could be added or deleted. So, the words 'and signed' or 'under the signature' cannot be added after the words 'in writing' appearing in Section 142(a) of the Act referred to already. If the Legislature intended that the complaint should also be signed by the complainant, it would have added the words referred to above but, deliberately, not done so for the reason that, in such an event, juristic person or body corporate, etc., could not file complaints, thereby negating the remedy provided under Section 138 of the Act. So, the argument, that the complaint should be under the signature of the complainant cannot be upheld.

10. For the second ground, the learned Counsel for the petitioner-accused has placed reliance on Sections 5 and 12 of the Partnership Act in support of his contention that it is only an authorized person under the deed of partnership or, a Managing Partner or, partner, as the case may be, can represent a firm and none else and as such, the complaint filed by Power of Attorney Holder of a firm is not tenable under law, that too, when not stated as authorized by the firm.

11. To appreciate said contention, Sections 5 and 12 of Indian Partnership Act require to be noted. They are as under :

'5. Partnership not created by status.--The relation of Partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying business as such, are not partners in such business.

12. The conduct of the business.--Subject to contract between the partners,--

(a) every partner has a right to take part in the conduct of the business;

(b) every partner is bound to attend diligently to his duties in the conduct of the business;

(c) any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion, before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and

(d) every partner has a right to have access to and to inspect and copy or any of the books of the firm'.

12. Mere reading of said provisions makes it clear that they do not prohibit firm from giving authorization to somebody to represents it (firm) and, there is nothing in the said provisions to hold that partner or managing partner of a firm only can act for and on behalf of a firm and no other person could be authorized by way of Power of Attorney to act for and on behalf of a firm.

13. In the case of MMTC Ltd. : 2002 CriLJ266 (supra) where the complaint was filed by a Company through its Manager, the Supreme Court held such complaint as maintainable when the complaint was in the name of payee and observed thus :

'In the case of Associated Cement Co. Ltd. v. Keshavanand : 1998 CriLJ856 , it has been held by this Court that the complainant has to be a Corporeal person, who is capable of making a physical appearance in the Court. It has been held that if a complaint is made in the name of incorporeal person (like a Company or Corporation), it is necessary that a natural person represents such a juristic person in the Court. It is held that the Court looks upon the natural person to be the complainant for all practical purposes.'

14. Even this Court had occasion to consider, whether a Power of Attorney Holder of payee could present a complaint or not. In the case of Rajeev Indani v. D. Veerendra Heggade, 2001 (105) Comp Cas 774 : (2001 AIR-Kant HCR 1213) and in the case of S. Ramesh v. Basanthkumar Path, ILR (2001) 1 Kant 2833, this Court has held complaint filed by Power of Attorney Holder of payee as valid and proper.

15. Of course, a different view was taken in the case of the S.P. Sampathy (2002 Cri LJ 2621) (supra), which is relied on for the petitioner accused. But, that is against the view of the Supreme Court and of this Court and as such, cannot be preferred. That apart, said view in the case of Sampathy (supra), if accepted, would negate the object and spirit of Section 142 of the Act by scuttling the prosecution /complaints by juristic person, corporate bodies or handicapped /disabled persons, etc., and as such, it cannot be accepted as correct.

16. At this stage, reference can also be had to Section 2 of the Power of Attorney Act, which empowers the donee of a Power of attorney to do anything 'in and with his own name and signature' by the authority of the donor of the power. Said Section declares that everything so done shall be as effectual as if it has been done by the donee of the power in the name and with the signature of the donor thereof and as such, the act committed by the holder of the Power of Attorney.

17. So and in view of Section 142(a) of the Act, besides the decision of the Supreme Court in the case of MMTC Ltd : 2002 CriLJ266 (supra) and of this Court referred to already and also in the case of C. Prabhu v. Sangam Corporation, Bangalore, 2002 Cri LJ 2142 : (2002 AIR-Kant HCR 1206), when a complaint is in the name and on behalf of firm and not in the name of the power of attorney holder showing power of attorney holder as the complainant, such complaint could be held as proper. Reference can also be had to a decision of High Court of Madhya Pradesh in the case of Dr. Anil Kumar Haritwal v. Santa Prakash Gupta, 2001 Cri LJ 3632. In the case on hand also, the complaint, though filed through power of attorney, is in the name of the firm. So, the complainant is the firm and not the power of attorney holder. Hence, it cannot be countenanced that the complaint filed by the firm through its Power of Attorney holder was not maintainable.

18. The third and last ground urged for the petitioner accused is, as Section 200 of Cr.PC mandates examination of complainant on oath by Magistrate, the Magistrate could not have substituted the same by examining power of attorney holder of complainant on oath to issue process against the accused. In this connection, strong reliance was placed on a Division Bench decision of Kerala High Court in the case of N. Harihara Iyer v. State of Kerala, 2000 Cri LJ 1251, a

Division Bench decision of this Court in the case of Naganagouda Veeranagouda Patil v. Malatesh H. Kulkarni, ILR (1997) Kant 2091 : (1998 Cri LJ 1707) another decision of this Court in the case of K.P. Jayarama Reddy v. G. Parameswarappa (1981) 1 Kant LJ 564 and also on a decision of the Supreme Court in the case of Sashi Jena v. Khadal Swain : 2004 CriLJ1394

19. It is true, in the case of Naganagouda (1998 Cri LJ 1707) (supra), this Court has held that permitting an Advocate to conduct examination -in-chief of the complainant and his witnesses at the time of recording their sworn statements was not proper. So also, when sworn statement was found not signed by the complainant, in the case of Jayarama Reddy (supra), this Court has held it as bad in law and quashed the process issued. However, issue relating to recording of sworn statement of power of attorney holder was not involved in any of the said decisions nor in the case of Sashi Jena and others (supra) decided by the Supreme Court though, of course, in the case of Harihara Iyer (supra), Kerala High Court has held that prior examination of the complainant on oath is a must in complaints filed for offence under Section 138 of N. I. Act. Thus, none of the decisions relied on for the petitioner-accused helps him for the point under consideration.

20. In the case on hand, admittedly, before issuing process against the petitioner accused, the complainant was not examined by the learned Magistrate. It was an impossibility for learned Magistrate to examine complainant on oath even if the complainant wanted or the learned Magistrate had directed complainant to examine the complainant named in the complaint. So power of attorney holder was examined on oath. This is because the complainant happens to be a firm and not a natural person. That is why, the firm, which is complainant in the case was /is represented by a power of attorney holder and it was that power of attorney holder, who was examined on oath by the learned Magistrate. So, the question is, 'whether it satisfies the requirements of Section 200 of Cr. P. C. or not?'

21. As noted already, this Court has taken a consistent view that a power of attorney holder could present complaint. Further, Section 2 of the Power of Attorney Act, which empowers the donee of a Power of attorney to do anything 'in

and with his own name and signature' by the authority of the donor of the power. Said Section declares that everything so done shall be as effectual as if it has been done by the donee of the power in the name and with the signature of the donor thereof and as such, the act committed by the holder of the power of Attorney. So, when power of attorney holder could represent complainant and present complaint on behalf of the complainant, it could be said that examining the power of attorney holder on oath by Magistrate is sufficient compliance of Section 200 of Cr.P.C. To construe otherwise, will be preventing complaints being filed by Corporation, body corporate, juristic person or even a natural person who, on account of inability either physical or otherwise, cannot appear before Court in person as complainant for any purpose, including examination on oath by learned Magistrate. This cannot be ignored though Section 200 of Cr.P.C. envisages examination of complainant on oath.

22. It is also pertinent to note, that, admittedly, Chapter XV of Cr. P. C. containing Section 200, deals with the procedure when a private complaint is filed before Court. So, while interpreting or considering provisions relating to procedural law, it would be proper to bear in mind the following observations made by the Supreme Court in the case of *State of Punjab v. Shamlal Murari*, : [1976]2SCR82 , reiterated by the Supreme Court recently in the case of *Rosy v. State of Kerala*, : 2000 CriLJ930 .

'We must always remember that procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaids and not the mistresses, a lubricant, not a resistant in the administration of justice. Where the non-compliance, the procedural will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, Courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time.'

In view of the above, when the power of attorney holder of the complainant, who had stepped into the shoes of the complainant, was examined on oath and not the complainant as such, who could not have been examined at any time in any manner, such a thing cannot be taken as vitiating the cognizance or complaint, as the case may be.

23. Even otherwise, at the most, non-examination of complainant and examination of power of attorney holder of complainant in such a case would be an irregularity and not an illegality, which does not vitiate the proceedings, particularly as such a procedure cannot be said to have prejudiced the petitioner accused in any way.

24. That apart, as observed and held by this Court in the case of Sri. Percy Fernandes v. Smt. Anitha Patrao (Crl. P. Nos. 4528 & 29/2003 decided today /26-7-2004), in complaints filed for offence under Section 138 of N. I. Act, non examination of complainant upon oath by Magistrate, is not at all fatal so as to invoke Section 482 of Cr.P.C., particularly when Sections 461, 462 and 465 of Cr.P.C. are borne in mind. So, the decision of the Kerala High Court in the case of Harihara Iyer (supra), strongly relied on for the petitioner-accused does not come to his aid, particularly when the point under consideration namely, whether examination of power of attorney holder in place of complainant could be said to be fatal or not, was not considered besides the scope of Sections 461, 462 and 465 of Cr.P.C. Thus, considered from any angle, I do not find any force in any of the contentions urged for the petitioner-accused. No other point was urged so as to consider it.

In the result, the petition is rejected.