

Fr. Thomas Vs. Thomas J. Padiyath

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Court : Kerala

Decided On : Nov-26-2002

Reported in : 2003(1)ALT(Cri)133; 2003CriLJ945

Judge : R. Basant, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 199(1) and 500; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 199(1)

Appeal No. : Cri. M.C. No. 4322 of 2000

Appellant : Fr. Thomas

Respondent : Thomas J. Padiyath

Advocate for Def. : P.M. Sebastian and; Philip Antony Chacko, Advs. and; T.K

Advocate for Pet/Ap. : K. Jaju Babu and; Joseph Sebastian Purayidam, Advs.

Disposition : Case dismissed

Judgement :

ORDER

R. Basant, J.

1. Accused 2 and 3 in Section T. 1876 of 2000 on the file of the Judicial First Class Magistrate-III Kottayam are the petitioners. They have filed this application under

Section 482 of the Criminal Procedure Code to quash the proceedings in the said S.T. 1876 of 2000. They along with three others are the accused in the said case. It is inter alia alleged in the complaint that they have committed the offence punishable under Section 500 of the Indian Penal Code. The gist of the complaint against them is that they have indulged in publication of malicious and defamatory imputations and insinuations against the complainant a person employed in Dubai. The complaint was filed by him through his power of attorney. The crux of the contention is that the holder of the power of attorney is not a person aggrieved by the offence and is therefore not competent to file the complaint.

2. The only question that falls for consideration in this Criminal Miscellaneous Case is hence whether the complainant/first respondent herein is competent to file the complaint through his power of attorney holder.

3. The relevant statutory provision is Section 199(1) of the Code of Criminal Procedure. I extract below Section 199(1) and its proviso.

'199. Prosecution of defamation.- (1) No Court shall take cognizance of an offence punishable under Chap. XXI of the Indian Penal Code (45 of 1880), except upon a complaint made by some person aggrieved by the offence: Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.

4. The complainant in the instant case is certainly the first respondent Thomas J. Padiyath. The said complainant has preferred this complaint through his power of attorney holder one Jacob J. Padiyath. If the said power of attorney holder Jacob J. Padiyath were to be reckoned as the complainant, certainly the complaint would be null, void and unsustainable and the proceedings will have to be quashed. There can be no doubt whatsoever on that aspect. The said power of attorney holder on his own right is certainly not a person aggrieved by the defamatory publication.

5. But it is very evident that the complainant is the first respondent Thomas J. Padiyath and not his power of attorney holder Jacob J. Padiyath. There can also be no contention whatsoever that Thomas J. Padiyath, the complainant is not a person aggrieved by the publication in question. I am not in these circumstances advertent to the precedents which have been cited at the bar to show that only a person aggrieved can file such a complaint. According to me Section 199(1) (like Section 198) only attempts to ensure that complaints can be entertained only at the instance of persons who are aggrieved by the offences specified. It does not according to me deal with the procedure for filing of complaints. In this view of the matter I hold that complaint filed in this case reckoned as a complaint filed by Thomas J. Padiyath the first respondent is certainly maintainable.

6. The complaint has of course not been presented before court by the first respondent/complainant in person. He has preferred the complaint through his power of attorney holder. The question then is whether a complaint under Section 199(1) can be preferred by the power of attorney holder of a complainant.

7. The decision reported in *Hamsa v. Ibrahim* (1993 (2) KLT 698) is in this context crucial. I extract below the relevant portions from paragraphs 7 to 9 of the said judgment:-

'7. In considering the question involved here legal position regarding the right of a person to appoint another as his agent has to be understood at least in a general manner. According to the Law of England 'every person who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right not less than when he is exercising any other right' (vide *Jackson and Co. v. Napper* ((1986) 35 Ch. D. 162 at page 172). This was recognised as a common law right. Blackburn, J. has stated in *Queen v. Justices of Kent* ((1873) 8 Q.B. 305) that 'at common law, when a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it'. The Supreme Court has declared in a decision that the law in India is also the same. (Vide *Vavulu Subbarao v. I.T. Commr.*, 1956 SC 604), Venkatarama Ayyar, J. in the said decision has observed that the said rule is subject to certain well known exceptions such as, when the act to be performed is

personal in character, or when the act to be performed is annexed to a public office, or to an office involving any fiduciary obligation. 'But apart from such exception, the law is well-settled that whatever a person can do himself, he can do through an agent' observed the learned Judge in the said decision. The above can thus be regarded as the legal position regarding the right to appoint an agent.

8. 'Power-of-attorney' is the instrument by which a person is authorised to act as the agent of the person granting it (vide Black's Law Dictionary). In Stroud's 'Judicial Dictionary', power-of-attorney is described as 'an authority whereby one is set in tune, stead, or place of another to act for him'. Stone, C.J. has adopted the said definition as effective and acceptable in *Ramdeo v. Lala Natha* (AIR 1937 Nag.65). Section 2 of the Power-of-Attorney Act, 1882 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. The section declares that everything so done 'shall be as effectual in law as if it had been done by the donee of the power in the name and with the signature of the donor thereof' (shorn of words which are not necessary in this context). In the light of such declaration, the legal position is that the power of attorney holder can do everything empowered by the donor and all such acts done by the donee shall have legal recognition and acceptance as though such acts were done by the donor himself.

9. Making a complaint before a court is not an act which would fall within the exceptions envisaged by Venkatarama Ayyar. J. in *Ravulu Subba Rao v. I.T. Commr.* (1956 SC 604).....'

(emphasis indicated)

In the said decision the court was considering a similar provision in Section 142 of the Negotiable Instruments Act. I extract below Section 142(a) of the Negotiable Instruments Act:-

'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'.

The normal rule in criminal law is that crimes being offences against the State, any person can set the criminal law in motion. Sections 198 and 199 of the Crl. P.C. and Section 142 of the Negotiable Instruments Act do carve out an exception to this general rule. My attention has been drawn to the decision reported in T.C. Mathai v. District and Sessions Judge (1999 (3) SCC 614). That decision is only authority for the proposition that if there is any particular provision obliging the presence of the party in person, Section 2 of the Power of Attorney Act cannot override such specific provision.

8. The question then is whether Section 199(1) incorporates such an exception to the general rule. Undoubtedly it does. It is impermissible for 'any person' to complain of commission of offences punishable under Chap. XXI of the Indian Penal Code. Such complaint must necessarily emanate from the person aggrieved by the offence. This is the indisputable mandate of Section 199(1). The proviso to Section 199(1) makes an exception to the general rule that the complainant must hail from that constituency of persons who are aggrieved by the offence. Under the proviso certain other persons in their own right are permitted to file complaints on behalf of the aggrieved persons. They will have to seek the leave of the court and thereafter they can prosecute the complaint as if they are the complainants notwithstanding the fact that they would be airing the grievance of another person aggrieved by the offence. I find nothing in the language of Section 199(1) and its proviso which can persuade me to hold that physical/personal appearance of the complainant for the purpose of filing the complaint is intended, insisted or essential. All that it insists is that the complaint must and can emanate only from a person aggrieved by the offence subject to the exception in the proviso that complaints by some other specified categories of persons can also be entertained.

9. In the instant case undoubtedly the named complainant is a person aggrieved by the offence. He has preferred the complaint in his own name. On account of his personal incapacity/inability to appear before court to present the complaint he has

in this case instituted the complaint through an authorised power of attorney holder. Evidently the learned Magistrate had granted him the requisite leave to present the complaint through the power of attorney holder. This is evident from the fact that the complaint presented by the power of attorney holder on behalf of the complainant was entertained, cognizance taken and summons issued. Even in the absence of a separate petition and specific orders, grant of such leave can be assumed in the facts of this case.

10. It is contended that such representation of the complainant by another can be made only in the circumstances enumerated in the proviso. The proviso is intended to cover all cases where a person other than the complainant presents the complaint, it is contended. I am unable to agree. According to me, the proviso to Section 199(1) of the Code deals with cases where another person (other than the aggrieved) complains of the offence on behalf of such aggrieved person and not a case where the aggrieved person himself complains of the offence but presents the complaint through another. The expression 'make a complaint on his or her behalf in the proviso to Section 199(1) does not refer to a representative presenting the complaint on behalf of the complainant but such representative figuring as the complainant himself and complaining of the offence. There is significant, real and legal difference between the two.

11. I shall for a moment assume that the proviso covers all cases where the complainant is unable to appear personally before court. Even in that event according to me the proviso permits the complaint to be preferred by an authorised representative with the leave of the court. The expression 'or is from sickness or infirmity unable to make a complaint' in the proviso is in this context of crucial significance. Such 'infirmity' need not be on account of reasons of health or age alone. Any debility, disability, difficulty or inability must therefore fall within the sweep of the expression 'infirmity' appearing in the proviso. A larger meaningful interpretation has got to be given for the expression 'infirmity' appearing in the proviso if the proviso were to be read and understood to cover such complaints in the name of the complainant being preferred by some other person holding the power of attorney of the complainant. The expression 'infirmity' cannot be read down to mean infirmity resulting from ill-health or age. The expression 'infirmity' in

language cannot also be understood in any limited or restricted sense. 'A personal failing' is as per the Websters Dictionary 'infirmity' in language. The Dictionary refers to A.J. Toynbee's famous statement that 'one of the besetting infirmities of living creatures is egotism'. Infirmity under the proviso to Section 199(1) must therefore be held to hold within its sweep any deficiency, debility, disability, impossibility, difficulty or inadequacy which the court finds to be reasonable and sufficient to dispense with the personal appearance of the complainant to present the complaint. Such a vibrant interpretation must be given to the expression 'infirmity' considering the purpose and purport of the proviso. Merely because a person is abroad and is hence unable to lodge a complaint within the time stipulated under the relevant provisions relating to limitation, no accused person can claim an unjustified advantage. It is in this context that I choose to take the view that 'infirmity' under the proviso to Section 199(1) must certainly take into account the inability of the complainant in this case to appear personally in court to present the complaint himself.

12. The power of attorney has been produced. There is no contention that the complainant does not suffer from the debility, infirmity and inability to appear in person before court because of his presence in a foreign country now. The geographical distance is certainly a sufficient infirmity for him to explain his inability to present the complaint in person. In these circumstances I take the view that even if it be held that no power of attorney holder can present the complaint on behalf of the complainant except under the circumstances covered by the proviso, it is perfectly possible for the complainant to present the complaint through his power of attorney as the complainant suffers from the infirmity of being away in a foreign country.

13. The decision of the Madras High Court reported in *Sambandam v. G. Natesan* (AIR 1966 Mad. 183) has come to my notice. In the said decision in almost identical situation a Single Judge of the Honourable High Court of Madras has taken the view that the mere residence of the complainant abroad does not justify his power of attorney holder making a complaint alleging commission of the offence under the proviso to Section 199(1). I note that the sweep of the expression 'infirmity' in the proviso to Section 199(1) was not subjected to detailed

scrutiny i n that case. At any rate I am not persuaded to accept the contra view accepted in Sambandam's case. I respectfully disagree with that view. No other precedent-binding or persuasive, has been brought to my notice.

14. It follows that the complaint filed by the complainant through the power of attorney cannot, in any view of the matter be held to offend Section 199(1) of the Code ofCriminal Procedure. The challenge in this Crl. M.C. therefore does not deserve to be upheld.

15. In the result, this Crl. M.C. is dismissed.

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