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Vijayakumar Vs. Amirthavalli

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Court : Chennai

Decided On : Jul-25-2007

Reported in : 2007CriLJ4475

Judge : K.N. Basha, J.

Acts : Negotiable Instruments Act - Sections 138; Code of Criminal Procedure (CrPC) - Sections 302

Appeal No. : Crl. R.C. No. 739 of 2007 and M.P. Nos. 1 and 2 of 2007

Appellant : Vijayakumar

Respondent : Amirthavalli

Advocate for Def. : K.V. Sridharan, Adv.

Advocate for Pet/Ap. : M.C. Swamy, Adv.

Judgement :
ORDER

K.N. Basha, J.

1. 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 under Section 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 under Section 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 under Section 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 under Section 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 under Section 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 under Section 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 under Section 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 under Section 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 Mada v. Bolly Cariyappa Hindley : 2005 CriLJ112 a complaint was filed by one B against the accused under Section 138 of the Negotiable Instruments Act in which congnizance 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 under Section 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 tiral 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 under Section 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 under Section 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 under Section 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 under Section 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.

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