

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.M.C. 670/2008 & CRL.M.A. 2540/2008

Reserved on : 12th March 2009

Decision on : 9th April, 2009

R.N. SINHA, PROPRIETOR HIMALAYA OVERSEAS.... Petitioner
Through Mr. D.N. Goburdhun with
Ms. Aakanksha, Advocates

versus

NISHA JAGTIANI Respondent
Through Mr. Vijay Aggarwal, Mr. Gurpreet
Singh, Advocates

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

Dr. S. Muralidhar, J.

1. This petition, under Section 482 of the Code of Criminal Procedure (Cr.P.C.), seeks the quashing of an order dated 10.8.2007 passed by the learned Metropolitan Magistrate (MM), New Delhi directing notice to issue to the petitioner under Section 251 Cr.P.C.

2. The aforementioned order was passed by the learned MM in a complaint case titled “*Nisha Jagtiani vs. R.N. Sinha*” under Section 138 of the Negotiable Instruments Act, 1881 (NI Act). The said complaint was filed in respect of the dishonour of three cheques of Rs. 1 lakh each dated 10th, 15th and 19th March, 2005 respectively issued by the petitioner R.N. Sinha

as proprietor Himalaya Overseas in favour of the complaint M/s. Ganga Textiles represented by its proprietor Nisha Jagtiani.

3. The cause title of the complaint reflected that the complainant was being represented by Sh. K.K. Bhatnagar, Special Power of Attorney (SPA). In para 1 of the complaint, it was stated that “complainant has duly authorized Sh. K.K. Bhatnagar to present this case and SPA executed in his favour is enclosed herewith”

4. The trial court record reflects that the said complaint was filed on 3.10.2005. It was dated 30.9.2005 and signed by the power of attorney (POA) holder and not by the complainant. It was accompanied by an affidavit by way of evidence dated 30.9.2005 of the power of attorney holder of the complainant. The copy of the power of attorney dated 29.9.2005 was also enclosed.

5. By an order dated 3.10.2005, the learned MM recorded that the pre-summoning evidence by way of an affidavit was led and closed. Arguments on summoning were heard. Cognizance was taken of the offence under Section 138 NI Act and summons was issued to the petitioner accused for 19.5.2006.

6. By an order dated 30.5.2007, the learned MM directed the counsel for the complainant to ensure the presence of the complainant on the next date of

hearing i.e. 30.6.2007.

7. On 30.6.2007, the learned MM passed the following order:

“30/06/07 Pr: AR with Counsel.

Accused on bail with counsel

Heard. File perused.

On the last date of hearing counsel for the complainant was directed to ensure the presence of the complainant in person inasmuch as the special power of attorney executed by the complainant in favour of the AR is containing the vague contents. The perusal of the SPA reveals that the AR to is appearing on behalf of the complainant has not been duly authorised to file the present complaint.

An exemption application on behalf of the complainant filed stated therein that the personal appearance of the complainant is no more required.

Having heard the argument advance by the counsel for the parties and as per the provisions of law the court can summon any person if the court thinks that the presence of such person is required for the adjudication of any case. This is the complaint case u/s 138 N.I. Act and the SPA executed by the complainant in favour of his attorney has no meaning in the eyes of law. Inasmuch as it is no where mentioned in the said SPA that the complainant has authorised any representatives to file the present complaint case u/s 138 NIA. Therefore as per provisions of law and in the interest of justice and for the just decision of the present case the personal appearance of the complainant is required.

Therefore, adjourned for 10.08.2005 for appearance of the complainant in person.”

8. On the next date of hearing i.e. 10.8.2007, the learned MM noted the contention of the counsel for the accused that examining the POA at the pre-summoning stage “has no meaning in the eyes of law inasmuch as the complainant never appeared in this case”. Impliedly rejecting the said submission the learned MM observed that the order dated 3.8.2005 passed by the predecessor MM had not been challenged. The learned MM by the impugned order dated 10.8.2007 proceeded to frame notice and called upon the petitioner to enter his plea. Upon the petitioner pleading not guilty the complaint was directed to be listed on 19.5.2008 for complainants evidence. The complainant was directed to appear in person “till her examination-in-chief and cross-examination”.

9. The proceedings of 19.5.2008 show that the complainant did appear on that date by that time the present petition had already been filed in this Court. On 27.2.2008 notice was directed to issue to the respondent and the trial court record was summoned. There fore, no proceedings took place thereafter in the Court of learned MM.

10. It is submitted by Mr. D.N. Goburdhun, learned Advocate appearing for the petitioner that the Magistrate could not have taken cognizance of the offence by the order dated 3.10.2005 since the complaint was not signed by the complainant, although filed through a POA. He submitted that this does

not satisfy the requirement of the law as explained by this Court in ***Ravi Gupta vs. R.C. Tiwari, II (2008) DLT(CRL.) 279***. He further points out that the SPA dated 29.9.2005 executed by the complainant in favour of the POA holder does not authorise the latter to file a complaint under Section 138 NI Act. Relying on the judgment of the Supreme Court in ***Janki Vashdeo Bhojwani and Another vs. Indusind Bank Ltd. and Ors., (2005) 2 SCC 217***, it is submitted that the POA holder cannot be expected to depose on behalf of the complainant by way of an affidavit of examination-in-chief since the facts were within the personal knowledge of the complainant. The POA holder cannot be expected to be cross-examined in respect of facts known only to the complainant. He submits that the order dated 30.6.2007 accepts the plea of the petitioner that the SPA executed by the complainant has no meaning in the eye of law. Thereafter the complainant has herself been appearing in person. He submits that since the order dated 30.6.2007 was never challenged by the complainant, the summoning order passed on the basis of the said SPA is unsustainable in the eyes of law and, therefore, should go altogether.

11. Mr. Goburdhun relies upon the judgment in ***State of Haryana v. Bhajan Lal, 1992 Supp.(1) SCC 335***, and submits that on merits the complaint was *mala fide* since the accounts between the parties was a running one and had already been reconciled before the date of the dishonoured cheque. There was no outstanding dues since there was no sale of goods beyond 31.3.2005. The five cheques issued in March 2005 had in fact been

replaced by three cheques issued in April 2005 which were encashed. However, the earlier five cheques were not immediately returned by the complainant on the assurance that she would return them once the cheques issued in April were cleared. Despite the cheques issued in April being cleared, the earlier five cheques issued in March were not returned and the complainant had *mala fide* presented those cheques when in fact there was no outstanding liability.

12. Mr. Vijay Aggarwal, learned counsel appearing for the respondent submits that in the present petition under Section 482 Cr.P.C. the prayer is only for setting aside the order dated 10.8.2007 passed by the learned MM framing notice under Section 251 Cr.P.C. There is no specific challenge to the summoning order. It is then submitted that the wording of the SPA indicates that it did authorise the filing of the complaint under Section 138 NI Act. It is submitted that there was no need for the complainant to challenge the order dated 30.6.2007 since in any event the complainant had been appearing in person thereafter. It would be opened to the accused to cross-examine the complainant and, therefore, no prejudice can be said to have been caused on that score. He relies upon the judgment of the Supreme Court in *M.M.T.C. Ltd. vs. Medchl chemical & Pharma (P) Ltd. and Anr., 2002 SCC (CRL.)121*, where it was held that even if initially the complaint had been presented by not filing a copy of the SPA, such defect could be cured at a later stage and the authorised representative of the complainant could represent the complainant at a later stage. Reliance is

also placed on the judgment of *M/s. Shankar Finance & Investments vs. State of A.P. & Ors., 2008 (3) JCC (NI) 345*, where after referring to the decision in *M.M.T.C. Ltd.*(supra), it was held that the complaint signed by the POA holder and not the complainant does become defective.

13. The first question that arises for consideration is whether the complaint in this case is defective since it was not signed by the complainant but by the POA holder. In the judgment of this Court in *Ravi Gupta vs. R.C. Tiwari*, the earlier decisions of the Supreme Court including the one *Jimmy Jahangir Madan v. Bolly Cariyappa Hindley, 1 (2004) 12 SCC 549*, were analysed and the legal position was summarized as follows:

“(i) A complaint under Section 138, NI Act can be filed by a complainant through a POA.

(ii) However, the complainant will have to seek the permission of the Court concerned for pursuing the complaint through a POA.

(iii) The leave of the Court to file the complaint through a POA can be sought by making an averment in the body of the complaint or by filing a separate application for that purpose along with the complaint.

(iv) The complaint filed through a POA has to be accompanied by a copy of the deed of special or general POA executed by the complainant. Where the complainant is a company this requirement can be satisfied even after the filing of the complaint.

(v) The examination of the POA holder upon oath at the time of presentation of the complaint and reduction into writing the substance of such examination shall be sufficient compliance with of procedure contemplated under the Cr.P.C. It is unnecessary thereafter for the complainant to also be examined on oath on his appearance on a future date.”

14. Subsequently, the Supreme Court in *M/s. Shankar Finance & Investments* (supra) reiterated the position by holding that the complaint does not become bad in law on account of it not being signed by the complainant but by the POA holder. It was held however that the description in the cause title of the complaint must be properly made. In para 9 it was observed, *inter alia* that if the cause title described the complainant as the proprietor or the proprietary concern represented by the attorney holder that would satisfy the requirement. Importantly in *M/s. Shankar Finance & Investments*, the Supreme Court referred *Janki Vashdeo Bhojwani and Another vs. Indusind Bank Ltd.* and observed that in the case of proprietary concerns, “many a time, the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or the attorney holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of the Code and only the Secretary of the Company or the partner of the firm a proprietor concern, who did not have personal knowledge of the transaction could be examined”. Accordingly, this Court finds no merit in the contention of the learned

counsel for the petitioner that the complaint in this case was not maintainable since it was not signed by the complainant but by the POA holder, and that the pre-summoning evidence was in the form of the affidavit of the POA.

15. The next question is whether in fact deed of SPA authorized the complainant to present the said complaint under Section 138 NI Act. The deed of the SPA has been perused by this Court. It authorizes the SPA holder “to sign and amend the plaint, application and petition on my behalf and to verify the same as per requirement of law and to file the same and to do all such things.....” The contention of learned counsel for the petitioner that the above clause does not permit the filing of the criminal complaint is not entirely correct. The words “application and petition” are wide enough to include a complaint under Section 138 of NI Act. Further, in para 9 of the SPA, the POA holder has been permitted to “compromise, compound or withdraw cases.” The above words can relate to criminal proceedings. Therefore, although the deed of SPA does not specifically advert to a complaint under Section 138 NI Act, this Court holds that its wording is wide enough to accommodate a complaint under Section 138 NI Act.

16. The next question is to be considered effect of the order dated 30.6.2007 passed by the learned MM holding that the SPA executed by the complainant has no meaning in the eye of the law. It must be pointed out

straightway that the said order was passed at a time when the judgment of this Court in *Ravi Gupta vs. R.C. Tiwari* (supra) had not been delivered. Also the judgment of the Supreme Court in *M/s. Shankar Finance & Investments vs. State of A.P. & Ors.* had also not been pronounced. The said order is obviously unsustainable in law in the light of the aforementioned pronouncement by this Court and the Supreme Court.

17. As pointed out by learned counsel for the complainant, since the complainant herself has been appearing, she can be cross-examined by the accused in relation to the statements made in the complaint and in the affidavit filed by way of pre-summoning evidence of the POA holder. No prejudice can be said to be caused to the accused on that score.

18. The contention of learned counsel for the petitioner that the complaint was instituted *mala fide* since the accounts between the parties had already been reconciled on the date of the presentation of the cheque, raises a disputed question of fact. This cannot be determined at the present stage without evidence being led at the trial.

19. Accordingly, this Court finds no merits in this petition. The submissions on merits made by the petitioner in the instant petition are left open to be considered by the trial court when urged before it by the petitioner at the appropriate stage. Any request by the accused for exemption from personal appearance will be made through an appropriate

application before the trial court and it will be considered by that court on merits.

20. The petition and application are accordingly dismissed.

21. The trial court record be returned forthwith along with a certified copy of the present order.

S.MURALIDHAR, J

APRIL 9, 2009

“dg”