

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.4.2015

Date of verdict : 03.06.2015

CORAM

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Crl.OP No.11046 of 2015

& M.P.Nos.1 and 2 of 2015

K.Pavithran

..Petitioner / Accused

Vs.

K.Ganesan
rep.by Power of Attorney
E.R.Mariappan,
Accountant
Kumaran Ginning Mills

.. Respondent

Prayer:- Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records in C.C.No.172 of ***2015** on the file of Judicial Magistrate Court, Tirupur and quash the same in the interest of justice.

For Petitioner :Mr.V.K.Sathiamurthy

ORDER

The accused before the trial court is the petitioner herein. For the sake of convenience, the parties will be referred to as complainant and accused. The complainant is M/s.The Kumaran Ginning Mills, a partnership firm run by one K.Ganesan (Managing Partner), K.Nirmaladevi and G.Pradeep. Mr.E.R.Mariappan is said to be an Accountant working in M/s. The Kumaran Ginning Mills.

2. It is the case of the complainant that the accused is the proprietor of M/s.Super Good Textiles and that he had purchased cloth on credit from the complainant by Bill Nos.103 to 120 to the tune of Rs.2,52,48,640/-. When the complainant started demanding payments, the accused executed a mortgage on 9.1.2013 with respect to a property belonging to him. Thereafter, the accused appears to have issued 5 Cheques for Rs.50 Lakhs each all dated 24.11.2014, totalling Rs.2,50,00,000/- towards the said liabilities. The cheques when presented for payment, were dishonoured, following which the complainant issued statutory notice on 28.11.2014 to the accused and on the failure of the accused to repay the amount within the stipulated period, the complainant lodged the prosecution in C.C.No.172 of ***2015** before the learned Judicial

Magistrate No.2, Tiruppur for an offence under section 138 of the Negotiable Instruments Act.

3. Challenging the prosecution, the accused has come before this Court on two principle grounds; (a) that the Power of Attorney given to E.R.Mariappan, the Accountant does not bear the signature of the three partners and therefore, the complaint based on such a Power of Attorney cannot stand; (b) that the trial court has taken cognizance of the case without examining the complainant under section 200 of Cr.P.C, but based on a proof affidavit filed by E.R.Mariappan, Power of Attorney holder.

4. To appreciate the validity of the first ground, it may be necessary to extract verbatim the preamble portion in the complaint and it reads as follows:

"1. The complainant M/s.The Kumaran Ginning Mills is a Registered Partnership Firm carrying on business in yarn and cloth at Door No.33/1Bm Kulathupalayam Pirivu, S.Periapalayam, Uthukuli Road, Tiruppur. The firm consists of three partners, viz., K.Ganesan, Thirumathi K.Nirmala Devi and G.Pradeep. K.Ganesan is the Managing Partner and he is liable and responsible for the day to day affairs of the firm. The registration No. of the Firm is 755/1994 and the same is in currency. By virtue of the Special Power of Attorney dated 20.12.2014 one of the partners, viz., K.Ganesan has appointed Thiru E.R.Mariappan, S/o.Ramasubbu, who is the Accountant of the complainant for the past 18 years and he is also well versed with the day to day affairs of the firm. The original Power of Attorney is produced herewith. He has been authorised to sign the Vakalath, complaint to give evidence and to do all lawful acts to do on behalf of the firm. In addition, the partners of the firm have also given an authorisation in favour of the above E.R.Mariappan to file prosecute, give evidence and the said letter is also produced."

5. On a reading of the above averments, it is clear that Mariappan is not only a Power Agent but is also aware of the transaction as he has been working as Accountant in the firm for 18 years. Further, it is clearly stated that K.Ganesan is the Managing Partner and he has given a Special Power of Attorney dated 20.12.2014 to E.R.Mariappan and that it is further supported by authorisation letter given by the other partners in favour of E.R.Mariappan.

6. The fundamentals of criminal jurisprudence is that criminal law can be set in motion by anyone. In certain enactments, like Negotiable Instruments Act, a small deviation has been envisaged. Under section 142(b) of Negotiable Instruments Act, only a payee or the holder in due course of the cheque can lay a prosecution for an offence under section 138 of N.I.Act. In this case, the cheques have been issued in favour of M/s.The

Kumaran Ginning Mills by the accused. According to the averments in the complaint, M/s. The Kumaran Ginning Mills is a partnership firm and K. Ganesan is the Managing Partner.

7. Sections 9, 12(a), 12(b), 18 and 19 of the Partnership Act, 1932 reads as under:

"9. General duties of partners:- Partners are bound to carry on the business on the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

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

18. Partner to be agent of the firm:- Subject to the provisions of this Act, a partner is the agent of the firm for the purpose of the business of the firm.

19. Implied authority of partner as agent of the firm:

(1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to:

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm

(f) acquire immovable property on behalf of the firm,

(g) transfer immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm." (emphasis supplied)

8. A reading of the aforesaid provisions indubitably show that an implied duty is cast upon every partner of the firm to act in accordance with the best interests of the firm and it is very much within the powers of Mr.K.Ganesan, to initiate criminal prosecution under section 138 of Negotiable Instruments Act against the accused for not repaying the amounts due to the firm.

9. Law does not say that the partner should himself file the prosecution under section 138 of Negotiable Instruments Act. The question of launching a valid criminal prosecution under section 138 of Negotiable Instruments Act with the aid of power of attorney is no more *res integra*, in view of the authoritative judgment of the Supreme Court in *A.C.Narayanan v. State of Maharashtra* and another reported in AIR 2014 SC 630.

10. In the present case, E.R.Mariappan is not a stranger but an Accountant working in the firm for 18 years and it is stated in the complaint that he is well versed with the day to day affairs of the firm. That apart, the other partners have also given authorization letters in favour of E.R.Mariappan to file the prosecution. In view of the above, the first ground falls.

11. Coming to the second ground, the learned counsel submitted that the trial court should have examined the complainant on oath under section 200 of Cr.P.C before issuing process and that the trial court ought not to have accepted the sworn affidavit for the purpose of issuing process. In support of this contention, the learned counsel cited the provisions of Section 145(1) of the Negotiable Instruments Act, which reads as follows:

"145. Evidence on affidavit:- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

12. The learned counsel submitted that in Section 145 of the N.I.Act, the expression "enquiry" has been employed and not the expression "inquiry" and this makes a whole lot of difference capable of vitiating the very cognizance taken by the Magistrate. At the first blush, this argument indeed looked very formidable. The word "enquiry" does not find place in the Code of Criminal Procedure. The word "inquiry" has been defined in 2(g) of the Code of Criminal Procedure, which reads as follows:

(g) "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;

13. It is apposite to say that the act of taking cognizance

of an offence by the Magistrate would amount to inquiry under the Code. The question is, will it include enquiry? Eleventh Edition of Concise Oxford English Dictionary defines the words "enquiry" and "inquiry" as thus:

"enquiry: n (pl.enquiries) an act of asking for information - an official investigation.

"inquiry"- n (pl.inquiries) another term for enquiry.

14. From the above definitions, it is clear that both words are interchangeable and does not make any serious difference in the meaning. That apart, section 145(1) of the Negotiable Instruments Act states that "...be read in evidence in any enquiry, trial or other proceeding under the said Code". The word "enquiry" should be read Ejusdem Generis with the expression "other proceedings under the said Code" and not in isolation. The legislature did not contemplate a different method of enquiry while taking cognizance of the offence under section 138 of Negotiable Instruments Act. Had the legislature felt so, it would have laid down a special procedure under the N.I.Act itself for conducting an enquiry at the time of dealing with a complaint for the offence u/s 138 of N.I.Act. Hence, Section 145(1) of N.I.Act should be read thus: a) ... be read in evidence in any enquiry under the said Code; b) ... be read in evidence in trial under the said Code; and c) ... be read in evidence in other proceedings under the said Code.

15. In my considered opinion, the usage of the expression "enquiry" in section 145 of the Negotiable Instruments Act should be read in the context in which it is employed and not be ascribed with abstruse meanings. It would be very desirable had the Legislature employed the word "inquiry" instead of "enquiry" and had that been done, there would not have been an occasion for this Court to hear the eloquence of Mr.V.K.Sathiamurthy, learned counsel for the petitioner. In the opinion of this Court, the usage of spelling "enquiry" instead of "inquiry" in Section 145(1) of the N.I.Act is a sheer legislative oversight and deserves no exaggerated meaning.

16. The next question that has to be decided is as to whether the Magistrate should have recorded the sworn statement of the complainant under section 200 of Cr.P.C or was he right in proceeding with the act of taking cognizance based on the affidavit filed by Mr.E.R.Mariappan under section 145 of the Negotiable Instruments Act. The answer to this question has been answered by the Supreme Court in Indian Bank Association and others vs. Union of India and others reported in (2014) 5 SCC 590 in the following terms:

"The Amendment Act, 2002 has to be given effect to in its letter and spirit. Hence, the following directions are issued:

(1) The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under section 138 of the NI Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons."

17. Again, in A.C.Narayanan v. State of Maharashtra and another, reported in AIR 2014 SC 630. In paragraph 22, the Supreme Court has stated as follows:

"22. From a conjoint reading of Sections 138, 142 and 145 of the N.I.Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint."

18. This Court is aware of the judgment of a learned Single Judge of this Court in Nelliappan vs. Samuvel (2008 (1) L.W.(crl.) 730), wherein after elaborately discussing the meaning of the word "evidence", the learned Judge has held that the sworn statement of the complainant should be recorded by the Magistrate under section 200 Cr.P.C and the Magistrate cannot proceed to issue process based on the affidavit of the complainant filed u/s 145 of N.I.Act. In the opinion of the Court, this judgment stands superseded by the aforesaid two judgments of the Apex Court. Ergo, the second ground raised by the petitioner also falls.

19. In the result, this Criminal Original Petition stands dismissed. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Asst.Registrar (CS III)

*Corrected as per order
of this Court
dated 3.6.2015
and made herein.

/true copy/

Sub Asst. Registrar

ajr

To

1. The Judicial Magistrate No.II, Tirupur

2. do thro the Chief Judicial Magistrate
Coimbatore

2 ccs to Mr.C.Rajan, Advocate, sr. 26582

Cr1.OP No.11046 of 2015

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