BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Monday, the Twenty Third day of February Two Thousand Fifteen

PRESENT

The Hon`ble Mr.Justice M.SATHYANARAYANAN

CRL OP(MD) No.865 of 2015
in
Crl.A(MD)SR No.1069 of 2015

RELIANCE INDUSTRIES LTD
3RD FLOOR, MAKER CHAMBERS IV,
NO.222, NARIMAN POINT,
MUMBAI 400 021, REP BY ITS
DULY CONSTITUTE ATTORNEY,
MR. V.VENKATACHALAM. .. PETITIONERS/APPELLANT/COMPLAINANT

Vs

1 M/S.ASHWINI ASSOCIATES,
NO.1, VANAMAMALAI NAGAR,
BYE PASS ROAD, MADURAI-10.

2 S.SANKARANARAYANAN
3 S.SHYAMALA .. RESPONDENTS/RESPONDENTS/A1 TO A3
4 SUBBULAKSHMI AMMAL
(A-4 DIED PENDING TRIAL AND
CHARGE AGANIST HER ABATED) .. RESPONDENT/RESPONDENT/ACCUSED-4

Petition praying that in the circumstances stated therein and in the petition filed therewith the High Court will be pleased to grant special leave to prefer appeal to this Hon'ble Court against the Judgment dated 18.11.2014 passed by the Learned Judicial Magistrate No.1/Fast Track Court Magisterial Level, Madurai against the judgment of acquittal passed by the Learned Judicial Magistrate No.1/Fast Track Court Magisterial Level, Madurai in STC No.940 of 2012 dated 18.11.2014 in acquitting the Respondents herein for the offence under Section 138 read with 142 of N.I.Act.

Order: This petition coming on for orders upon perusing the petition filed in support thereof and upon hearing the arguments of M/S.R.KARTHIKEYAN, Advocate for the petitioner and the Court made the following order:-

The private complainant in S.T.C.No.940 of 2012 on the file of the Court of Judicial Magistrate No.I, Fast Track Court at Magisterial Level, Madurai, is the petitioner and aggrieved by the order of acquittal dated 18.11.2014, acquitting the respondents/accused for the commission of the offences under Section 138 read with Section 142 of the Negotiable Instruments Act, has filed this petition, for grant of leave to prefer the appeal against acquittal.

2. A perusal of the materials placed before this Court, in the form of typed set of documents, would disclose the following facts:

2.1. The petitioner/complainant company, represented by Mr.V.Venkatachalam, is the duly constituted power of attorney executed by the said company in his favour and the said company is engaged in the business among other things, manufacturing and marketing of Polyester Staple Fibre, etc. On 01.04.2008, an agreement came into being between the petitioner/complainant and the first respondent/A.1, which is the partnership firm in which, the respondents 2 to 4/A.2 to A.4 are the partners.

2.2. As per the terms of the above said agreement, dated 25.04.2008, the first respondent/A.1 was acting as *del credere* agent of the petitioner/complainant for sale of the products of the complainant company.

2.3. It is the case of the complainant that the accused while acting in that capacity, had collected from various customers of the complainant, a sum of Rs.2,23,50,327.61 payable by the said customers to the complainant towards the products delivered and the said amount was also confirmed by A.1, vide letter dated 23.09.2008.

2.4. It is the further case of the complainant that out of the above said sum, the accused failed and neglected to pay a sum of Rs.1,87,28,768.61 to the complainant and in order to secure the said payment, the fourth respondent/A.4 (since deceased), has created a second charge in respect of the landed property at No.1, Vanamamalai Nagar, Bypass Road, Madurai - 10, by executing a registered deed of simple mortgage bearing Document No.957/2009.

2.5. Subsequently, the accused requested the complainant to release the second charge and the amount due and payable was confirmed as Rs.2,73,29,776.61 as on 30.07.2010 and on the basis of the undertaking dated 28.07.2010, executed by the accused, willing to pay a sum of Rs.10,00,000/-, the second charge was released and a sum of Rs.2,63,29,776.61 was confirmed as amount payable by the accused and a promissory note was also executed by the accused.

2.6. It is the specific case of the complainant that in order to discharge the said debt, the impugned cheque dated 30.07.2010 was issued, which, on presentation, got dishonoured on 16.11.2010. Thereafter, a statutory notice was issued on 06.12.2010 and on receipt of the same, the accused caused a common reply on 31.12.2010, containing false and frivolous allegations and therefore, came forward to file the complaint to punish the accused for the common of the offences under Section 138 read with Section 141 of the Negotiable Instruments Act.

2.7. The private complaint was taken on file in S.T.C.No.940 of 2012 and A.1 to A.3 pleaded not guilty to the charges framed against them and the charge against A.4 got abated as she died.

2.8. During the course of the trial in the private complaint in S.T.C.No.940 of 2012, the power of attorney of the complainant has filed a proof affidavit in chief and Exs.P.1 to P.10 were marked.

2.9. In the cross-examination, P.W.1 deposed that though there was an arbitration clause in the agreement, it was not invoked and the present complaint came to be filed with regard to the business transaction that took place between April 2008 and September 2008 and further stated that A.1 collected the amount from the customers to be payable to the complainant company, but the particulars regarding the companies which made payments to A.1, have not been stated and so also, the details with regard to the despatch of the goods to the said companies.

2.10. It is further stated by P.W.1 in the cross-examination that the details of commission of amount paid to A.1 firm cannot be given by him and with regard to the amount collected from the customers by A.1 firm, the details of which can be revealed only after going through the documents.

2.11. P.W.1 would admit in the cross-examination that only in the accounts maintained by the complainant company, the details of amount due and payable from A.1 would find place and the said document has not been marked.

2.12. P.W.1 would further admit that he cannot give the details with regard to the execution of the simple mortgage deed and with regard to Ex.P.4 - undertaking, he would state that A.1 firm has to pay a sum of Rs.1,87,28,768.61 and the remaining amount represents interest at the rate of 21% per annum, payable on 31.07.2010. He would further state that with regard to the payment made by A.1 after September 2008, the concerned documents have not been marked and denied the suggestion that the signed blank cheques have been obtained from A.1 and further denied that the cheques have been given as security for the purpose of utilising the funds. It was further admitted by P.W.1 that no details regarding the amount collected by A.1 from the customers of the complainant company, have not been stated in the complaint and in the event of the trial Court orders for production of the same, it will be submitted.

2.13. The trial Court on consideration of the oral and documentary evidence, found that though the amount of Rs.1,87,28,768.61 is mentioned in Ex.P.4 - undertaking, the amount of Rs.2,63,29,776.61 has been arrived at and A.1 collected a sum of Rs.2,23,50,327.61 from the customers and according to the complainant, the accused failed to pay a sum of Rs.1,87,28,768.61 and observed that nowhere in the complaint, nothing has been stated about the payment of rest of the amount by A.1 firm.

2.14. The trial Court, on going through the testimony of P.W.1 - power of attorney, found that he was not able to disclose anything satisfactorily pertaining to the case in his cross-examination with regard to the execution of Ex.P.5 - promissory note and Ex.P.6 - impugned cheque and also observed that according to P.W.1, the transaction between the complainant company and the accused firm as over in the month of September 2008 and the said fact has not been disclosed in the complaint. The trial Court has also taken into consideration the fact with regard to the ignorance pleaded by P.W.1 as to the details of the goods sent to the customers directly and not through A.1 firm and in fact, nothing has been stated about the documents relating to the same found in the complaint as well as in the proof affidavit in lieu of chief examination.

2.15. The trial Court also took note of the admission made by P.W.1 in his cross-examination that the customers are having objection for payment of goods either directly or through A.1 firm and that the accounts maintained by the complainant company with regard to the transactions with A.1 concern have also not been disclosed and the trial Court, on an overall appreciation of oral and documentary evidence, found that P.W.1, in his capacity as a power of attorney, pleaded ignorance of very many vital facts and has not let in any cogent and convincing oral and documentary evidence and also not proved the legally enforceable right.

2.16. The trial Court citing the said reasons, has recorded a finding that A.1 to A.3 are not guilty of the offences under Sections 138 read with 142 of Negotiable Instruments Act and acquitted all of them under Section 255(1) Cr.P.C, vide impugned judgment dated 18.11.2014.

2.17. The complainant company, aggrieved by the order of acquittal passed by the trial Court, has filed this appeal and prayed for special leave under Section 378(4) Cr.P.C. to prefer the appeal against acquittal.

3. Mr.R.Karthikeyan, learned Counsel for the petitioner/appellant has invited the attention of this Court to the typed set of documents and would submit that by virtue of the letter of undertaking, marked as Ex.P.4, coupled with Ex.P.5 - promissory note, the impugned cheque issued towards the legally enforceable debt, which on presentation, got dishonoured and in spite of a statutory notice, all the accused did not care to repay the same, which necessitated in filing of the complaint and the trial Court, without properly appreciating the oral and documentary evidence in proper perspective, has erroneously dismissed the complaint and acquitted the accused and hence, prayed for leave.

4. This Court has considered the submissions made by the learned Counsel for the petitioner/appellant and also perused the typed set of documents.

5. In ***A.C.Narayanan v. State of Maharashtra*** reported in ***2013 (5) CTC 560,*** the entitlement of power of attorney to file a complaint and depose before the Court under Section 138 of the

Negotiable Instruments Act, came up for consideration and held as follows:

"22. From a conjoint reading of Sections 138, 142 & 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. However, it is a matter of discretion and the Magistrate is not bound to call upon the Complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the Complaint under Section 138 of the N.I.Act. For the purpose of issuing process under Section 200 of the Code, it is open to the Magistrate to rely upon the verification in the form of Affidavit filed by the Complainant in support of the Complainant under Section 138 of the N.I. Act. It is only if and where the Magistrate, after considering the Complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of Affidavit of the Complainant, is of the view that examination of the Complainant or his witness(s) is required, the Magistrate may call upon the Complainant to remain present before the Court and examine the Complainant and/or his witness upon oath for taking a decision whether or not to issue process on the Complaint under Section 138 of the N.I. Act.

23. In the light of the discussion, we are of the view that the Power of Attorney Holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the Power of Attorney Holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the Attorney Holder of the Complainant is in charge of the business of the Complainant-Payee and the reason why the Attorney Holder cannot depose as a Witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney Holder about the transaction in question must be specified in the Complaint. On this count, the fourth question becomes infructuous."

6. As per the *ratio* laid down in the above said decision, the power of attorney can file, appear and depose for the purpose of issuing of process for the offence punishable under Section 138 of the Negotiable Instruments Act and an exception has been carved out to the effect that when the power of attorney holder of the complainant, have a personal knowledge about the transactions, then he cannot be examined. However, whether he is not in-charge of the business of the complainant and he alone is personally aware of the transactions, he can depose as a witness and there must be explicit assertion as to the knowledge of power of attorney holder about the transaction in question to be specified in the complaint.

7. However, in the complaint, there is no such assertion by the power of attorney of the complainant company, but in the proof affidavit filed in lieu of chief examination, it has been stated that he is a duly constituted power of attorney of the complainant company and thus, he is well acquainted with the facts and circumstances of the case.

8. This Court has also gone through the testimony of P.W.1, especially, his cross-examination and found that on many important factual aspects, P.W.1 - power of attorney of the complainant company, pleaded ignorance and he does not have any personal knowledge about the transactions between the complainant company and A.1 firm.

9. The trial Court, on an in-depth analysis of oral and documentary evidence, has rightly reached the conclusion that the complainant has failed to adduce any cogent and convincing oral and documentary evidence as to the existence of the legally enforceable debt or debt due to the firm or company concerned.

10. This Court is also of the view that the power of attorney of the complainant company, who was examined as P.W.1, was not personally aware of the transactions, as elicited during his cross-examination and therefore, this Court is of the considered opinion that the order of acquittal passed by the trial Court is perfectly sustainable and there is no error or infirmity in the impugned judgment, acquitting A.1 to A.3 under Section 255(1) Cr.P.C.

11. In the result, this Criminal Original Petition for special leave to file the appeal against acquittal, is dismissed. Consequently, Crl.A.(MD)SR.No.1069 of 2015, is rejected.

sd/-
23/02/2015

/ TRUE COPY /

Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

THE JUDICIAL MAGISTRATE NO.I / FAST TRACK COURT, MAGISTERIAL LEVEL, MADURAI.

+1. CC to M/S.R.KARTHIKEYAN, Advocate SR.No.8221.

ORDER IN
CRL OP(MD) No.865 of 2015
IN CRL.A(MD)No.1069 of 2015
Date :23/02/2015

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