

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 14.11.2016

DELIVERED ON: 28.11.2016

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

CrI.O.P. No.21422 of 2016 & CrI.M.P. No.9926 of 2016

- 1 Venture Softech India Private Ltd.
represented by C.E.O.
N.S. Murali
Sourabha Complex
Hindu, aged about 45 years
No.5, Am, Industrial Estate
12th K.M. Stone
Garavebhavi Palaya
Bengaluru 560 069
 - 2 N.S. Murali
Chief Executive Officer
Sourabha Complex
No.5, Am, Industrial Estate
12th K.M. Stone
Garavebhavi Palaya
Bengaluru 560 069
- Petitioners

vs.

Startup Xperts
its Proprietor, Poornima
represented by Power Agent
Shyam Sekar S, 44 years
S/o R. Sethunarayanan
No.8 & 9, EVR Street
Kothari nagar
Ramapuram
Chennai 600 089

Respondent

Criminal Original Petition filed under Section 482, Cr.P.C.
seeking to call for records and quash the complaint in C.C.
No.5246 of 2015 on the file of the XXIII Metropolitan Magistrate
Court, Saidapet, Chennai and presently pending on the file of
the Fast Track Court No.III, Saidapet, Chennai.

For petitioners Mr. A. Navaneethakrishnan
 Sr. Counsel
 for M/s.O.R.Mahesvaren & N.Saravanya

For respondent Mr. A.M. Rahmath Ali

ORDER

This Criminal Original Petition has been filed seeking to call for records and quash the complaint in C.C. No.5246 of 2015 on the file of the XXIII Metropolitan Magistrate Court, Saidapet, Chennai, presently pending on the file of the Fast Track Court No.III, Saidapet, Chennai.

2 Startup Xperts (the complainant) is a proprietary concern, its Proprietor being Poornima. It is the case of the complainant that she entered into a business consultancy agreement with Venture Softech India Pvt. Ltd. (A1) during November 2013. It is her further case that for the consultancy services rendered by her, the first accused owes a sum of Rs.8,42,700/- and towards settlement of the said dues, the first accused had issued two cheques dated 28.02.2015 and 28.03.2015 drawn on HDFC Bank, Koramangala Branch, Bengaluru, for Rs.4,50,000/-. The complainant presented the said cheques on the dates mentioned therein, viz., 28.02.2015 and 28.03.2015 for clearance in her account in ICICI Bank, K.K. Nagar Branch and both the cheques were returned unpaid on the ground "payment stopped by drawer". The returned memos are dated 27.05.2015. The complainant issued a statutory notice dated 24.06.2015 under Section 138 of the Negotiable Instruments Act, 1881, calling upon the first accused to pay the amounts covered by the cheques within 15 days from the date of receipt of the said notice. It is not known as to on what date, the first accused received the statutory notice, but, the first accused had issued a reply notice dated 30.07.2015 repudiating the complainant's claim. Thereafter, Startup Xperts, represented by Poornima, launched a prosecution against the first accused and N.S. Murali (A2), its Chief Executive Officer in C.C. No.5246 of 2016, which is now pending before the Fast Track Court No.III, Saidapet, Chennai. Challenging the said prosecution, both the accused are before this Court.

3 Heard Mr. A. Navaneethakrishnan, learned Senior Counsel appearing for the accused and Mr. A.M. Rahamath Ali, learned counsel for the complainant.

4 Mr. A. Navaneethakrishnan, learned Senior Counsel made the following two-fold submission:

- a that the prosecution is barred by limitation and
- b that the prosecution has been launched even without power of attorney

5 Per contra, Mr. Rahamath Ali, learned counsel for the complainant refuted the allegations of the accused.

6 This Court called for the records from the Trial Court. From a thorough scrutiny of the original records called for from the Trial Court, it is seen that the complaint has been drawn in the name of Startup Xperts, its Proprietor Poornima, represented through her husband in the capacity of Power Agent Shyam Sekar, S/o R. Sethunarayanan.

7 The complaint and the accompanying vakalatnama have been signed by Shyam Sekar. The complaint has been initially presented on 24.08.2015 before the Judicial Magistrate Court, Poonamallee, as could be seen from the date seal affixed on the original complaint. It is not known as to how the Judicial Magistrate Court, Poonamallee, could have territorial jurisdiction to entertain the complaint.

8 As stated above, the complaint was presented on 24.08.2015, whereas, the amendment to Section 142 of the Negotiable Instruments Act, had come into force with effect from 15.06.2015, under which, the place of business of the complainant is not the determinative factor for conferring territorial jurisdiction on the Magistrate, but, the place where the bank of the complainant is situate or the bank of the accused is situate, where, the collection has not been made through the bank of the complainant. Without keeping abreast of this development in law, the complaint has been filed before the Judicial Magistrate Court, Poonamallee. The Judicial Magistrate, Poonamallee, was holding on to this complaint from 24.08.2015 to 30.09.2015. Ultimately, he returned the complaint on 01.10.2015 to the complainant to present the same before the jurisdictional Court.

9 From the original records, this Court does not find any material to infer that the complaint was presented on 24.08.2015 along with a power of attorney. Except saying in the complaint that Shyam Sekar is Poornima's power agent, the complaint does not even refer to the existence of a power of attorney even in the list of documents column appended to the complaint.

10 The learned counsel for the complainant has collected the original records from the Judicial Magistrate Court, Poonamallee and after making a lot of corrections using whitener, has re-represented it before the XXIII Metropolitan Magistrate Court at Saidapet, Chennai, on 09.10.2015, as could be seen from the date seal found therein. On 25.11.2015, a

sworn affidavit, signed by Shyam Sekar only in the second page, has been filed before the XXIII Metropolitan Magistrate Court, Saidapet. It is to be noted that there is no signature in the first page of the sworn affidavit. The proof affidavit also does not bear any indication about the existence of a power of attorney.

11 On the strength of this proof affidavit, the XXIII Metropolitan Magistrate, Saidapet, has taken cognizance of the offence on 25.11.2015 and has issued process to Venture Softech India Pvt. Ltd. (A1) and N.S. Murali (A2), for their appearance on 06.01.2016. After receipt of process, N.S. Murali (A2) appeared before the XXIII Metropolitan Magistrate, Saidapet. The XXIII Metropolitan Magistrate, Saidapet questioned N.S. Murali (A2) under Section 251, Cr.P.C. on the accusation in the complaint, for which, he pleaded not guilty. The XXIII Metropolitan Magistrate, Saidapet, transferred the case to the file of the Fast Track Court No.III (Magisterial level), Saidapet (Special Magistrate for Negotiable Instruments Act cases) on 23.06.2016, directing the complainant and the accused to appear before the said Court on 15.07.2016. After the case files were transferred to the file of the Fast Track Court No.III, (Magisterial level), Saidapet, a power of attorney dated 21.09.2015, purported to have been executed by Poornima to Shyam Sekar, has been filed before the said Court and it is available in the original case records.

12 As regards the contention that the complaint is barred by limitation, Mr. Navaneethakrishnan, learned Senior Counsel, submitted that neither in the complaint, nor in the sworn statement, the complainant has stated as to when the statutory notice under Section 138 of the Negotiable Instruments Act was received by the accused. According to the learned Senior Counsel, only if that date is specifically mentioned, can the 15-day period for payment of the cheque amount be reckoned and thereafter, the 30-day period for filing the complaint be determined.

13 Per contra, Mr. Rahamath Ali, learned counsel for the complainant, submitted that the legal notice was issued on 24.06.2016 and the postal acknowledgment card was not got back on account of various reasons and therefore, the complainant does not know as to exactly on what date, the notice was served on the accused. He submitted that the accused have given a reply notice dated 30.07.2015 after having received the statutory notice dated 24.06.2015, in which also, the accused have cleverly not stated as to when they received the statutory notice dated 24.06.2015.

14 In the considered opinion of this Court, that, by itself, cannot be a reason for quashing the prosecution,

because, the complainant can now also file a petition under proviso to Section 142(1) of the Negotiable Instruments Act for condonation of delay. The date of receipt of statutory notice by the accused is a question of fact, which cannot be gone into in a petition under Section 482, Cr.P.C. and even if there is a delay, the same can be condoned by the Court, if the complainant files an application under proviso to Section 142(1) of the Negotiable Instruments Act. In any event, the limitation stopped running from 24.08.2015 when the complaint was presented before the Judicial Magistrate Court, Poonamallee. Hence, the plea of Mr. Navaneethakrishnan, learned Senior Counsel, that the prosecution has to be quashed on the ground of limitation, stands negatived.

15 Coming to the next contention as regards power of attorney, as observed by this Court, the complainant filed a power of attorney on 21.09.2015 only after the case was transferred from the file of the XXIII Metropolitan Magistrate Court, Saidapet, to the file of the Fast Track Court No.III (Magisterial level), Saidapet on 23.06.2016. There is no shred of evidence to show that either at the time of filing of the complaint on 24.08.2015 before the Judicial Magistrate Court, Poonamallee or when the matter was taken cognizance of by the XXIII Metropolitan Magistrate Court, Saidapet, on the sworn statement of Shyam Sekar, the power of attorney was available on record.

16 In the considered opinion of this Court, this also, by itself, cannot be a reason to quash the prosecution, because, it is always open to Poornima herself to come to the witness box and ratify the acts of her Power Agent, Shyam Sekar. However, an insurmountable difficulty in this case is the following statement of law by a 3-Judge Bench of the Supreme Court in A.C. Narayanan vs. State of Maharashtra and another [(2014) 11 SCC 790]:

"33.3 It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case."

17 The complaint does not contain any averment that Shyam Sekar, the power of attorney holder, has knowledge of the said transaction. Even in the proof affidavit dated 25.11.2015 sworn to by Shyam Sekar, this averment is absent. This, in the considered opinion of this Court, is very vital for the very institution of the prosecution by the power agent on behalf of the principal. Though Shyam Sekar may be the husband of Poornima, nevertheless, that, by itself, cannot be a qualification for the Courts to infer that he has the knowledge

of the transaction in question. Therefore, only on this short ground, the prosecution is liable to be quashed, with liberty to the complainant to once again file a fresh complaint with appropriate application for condonation of delay, if so advised and it is ordered accordingly.

18 It is made clear that the quashment of the complaint will not be a bar for the complainant to file a fresh complaint, of course, with an application for condonation of delay, if so advised, as the principle of *autrefois acquit*, will not apply, since the prosecution is not quashed on merits, but, on sheer technicalities.

19 Before parting with the matter, this Court is constrained to make the observation that most of the prosecutions under Section 138 of the Negotiable Instruments Act are quashed, not because, the accused are innocent, but, because of ill drafting of complaints by those who are supposed to have the necessary legal acumen.

20 In the United Kingdom, the Legal Services Board established by the Legal Services Act, 2007, conducted an extensive study on the quality of the advocates in the Criminal Bar and came to the inference that the common man does not have quality legal service in Criminal Courts. Therefore, the Board devised a scheme titled "Quality Assurance Scheme for Advocates" (for brevity "QASA") to assess the quality of advocates periodically by an appraisal process, which was challenged before the Courts. Ultimately, the UK Supreme Court, on 24.06.2015, in *R (on the application of Lumsdon and others) vs. Legal Services Board*, upheld QASA. It may be felicitous to extract paragraph no.114 of the said judgment:

"114. The core feature of the scheme is that every criminal advocate without exception, who wishes to practise at one of the upper levels, must undertake judicial assessment at the outset. No criminal advocate, competent or incompetent, can slip through that net, and every client has the protection that whoever represents him in a case at an upper level will have been subject to such assessment."

21 Every litigant has a right to have quality legal advice and if the Bar Council is not able to ensure that, some honest introspection requires to be done by all the stakeholders.

In fine, this Criminal Original Petition is allowed and the prosecution in C.C. No.5246 of 2015 on the file of the Fast Track Court No.III (Magisterial level), Saidapet, Chennai, is quashed, of course, with liberty, as stated above. Connected Crl.M.P. is closed.

Sd/-
Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

To

1 The Fast Track Judge No.III
Saidapet
Chennai

2 The Public Prosecutor
Madras High Court
Chennai - 600 104

Copy to:
The Section Officer,
Criminal Section,
HighCourt, Chennai.

+1 cc to Mr.O.R.Maheswaran,advocate,sr.70478

+1 cc to Mr.A.M.Rahamath Ali,advocate,sr.69502.

ks(co)
krd 26/12

Crl.O.P. No.21422 of 2016

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