

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 597 OF 2023

M/s. Sab Retail Solutions and ors. ... Petitioners
v/s.
M/s. R.R. Enterprises and anr. Respondents

Mr. B.V. Holambe Patil for the Petitioners.
Mr. Jatin Shah a/w. Ms. S.G. Preeti, Ms. Snehankita Munj and
Ms. Shraddha Kamble for the Respondents.
Mr. R.M. Pethe, APP for the Respondent – State.

CORAM: R.G. AVACHAT, J.

DATED : 01st MARCH, 2023.

P. C. :-

. Heard.

2. The challenge in this Writ Petition is to the order dated 02/11/2022 passed by the learned Metropolitan Magistrate, 7th Court, Dadar, Mumbai on an Application at Exhibit – 78 in C.C.No.2981/SS/2017.

3. Application at Exhibit – 17 was moved with a prayer for recalling the complainant/respondent for bringing on record the fresh power of attorney (POA) executed by the complainant.

4. It is a case instituted for offence punishable under section 138 of

the Negotiable Instruments Act. The Petitioners herein are the accused in the said case. The said complaint has been filed by PW1-Rajendra Barve in capacity as a POA of his wife, who is a proprietor of the complainant – M/s. R.R. Enterprises.

5. In paragraph 1 of the complaint itself, it has been mentioned that PW1-Rajendra Rathod was looking after day-to-day affairs of the proprietary concern. His wife (proprietress) has executed a POA in his favour authorizing him to institute complaint under section 138 of NI Act against the persons who have issued cheques in favour of the proprietary concern.

6. The POA was not filed along with the complaint. PW1-Rajendra examined himself on oath. He referred to and relied on a POA (exhibit – 20) dated 20/12/2017 executed by his wife in his favour. Clause (1) of the said POA reads thus :-

1] To file Complaint with respect to the dishonour of Cheque against the various Concern in the Court of Law U/s. 138 of Negotiable Instruments Act and also to give evidence in the Case. ”

7. PW1-Rajendra Barve was cross examined for and on behalf of the Petitioners. In his cross-examination, he deposed thus :-

“ There is no mention in Ex 20 (POA) about the specific name of accused firm for filing the case. There is no mention in Ex-20 (POA) about the POA entered in the register of notary. ”

8. Thereafter, the Respondent-complainant preferred the application at Exhibit – 78 for production of fresh POA. The learned advocate for the Petitioners would submit that the Application at Exhibit – 78 was preferred to fill up lacuna came on record during cross-examination of PW1-Rajendra. The impugned order allowing the application materially affects/prejudices the Petitioners in their defence. The POA was not filed along with the complaint. It does not bear registration number from the Register of Notary. As such, it was a complaint filed by an unauthorized person.

9. The order below Exhibit – 78 was first challenged by filing the revision application before the learned Additional Sessions Judge, Greater Bombay. The revision application came to be dismissed holding it to be not maintainable as having been filed against an interlocutory order.

10. What can be inferred from the record is that PW1-Rajendra filed a complaint as POA of his wife. In paragraph 1 of the complaint, he

has averred the said fact. The POA executed by his wife was also produced in evidence. It came to be marked as Exhibit – 20. Clause (1) of the POA indicates PW1-Rajendra to have been authorized to file complaint under section 138 of the Negotiable Instruments Act. The trial court allowed the application exercising its discretion under section 311 of the Code of Criminal Procedure.

11. In case of ***M/s. Haryana State Coop. Supply and Marketing Federation Ltd. v/s. M/s. Jayam Textiles and anr. 2014 STPL(Web) 255 SC***, the Apex Court has held thus :-

“ 10. Having heard learned counsel for the parties and after perusing the material on record, we find that admittedly authorization by the Board of Directors of the appellant-Federation was not placed before the Courts below. But, we may notice that a specific averment was made by the appellant-Federation before the learned Judicial Magistrate that the said General Power of Attorney has been filed in connected case being CC No. 1409/1995, which has neither been denied nor disputed by the respondents. In any case, in our opinion, if the Courts below were not satisfied, an opportunity ought to have been granted to the appellant-Federation to place the document containing authorization on record and prove the same in accordance with law. This is so because procedural defects and irregularities, which are curable, should not be allowed to defeat substantive rights or to cause injustice.

Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. ”

12. According to the learned advocate for the Petitioners, the aforesaid authority is applicable only in case wherein the complaint has been filed by partnership firm or company and not an individual. This Court is not in agreement with the submissions made by the learned advocate for the Petitioners. It is reiterated that in the complaint itself, there are specific averments of PW1 to have been a POA of his wife/proprietress of M/s. R.R. Enterprises. The POA – Exhibit 20 was produced in evidence and proved as well. Merely because the same does not bear a registration number from the Register of Notary, the same would not be non-est document. For being on the safer side, a fresh POA was executed and sought to be produced in evidence by recall of PW1-Rajendra. The trial court had itself observed in paragraph 7 of the impugned judgment that question of valid authorization would be a matter of final adjudication. As such, by granting an application at Exhibit – 78, no prejudice is caused to the Petitioners herein since they can argue that the subsequent POA may be of no avail.

13. For the aforesaid reasons, this Court finds no reason to interfere with the order impugned herein. The Petition therefore fails and is accordingly dismissed.

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JAYANI

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(R.G. AVACHAT, J.)