

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3186 OF 2022

Mrs.Leena Nirmal Chhadva,
Proprietress of Sapan Creatives,
Age 57 years, Occ.Business,
R/o.1, Bungalow, Neelkanth Nilayam
CHS Ltd, Opp.Joy Hospital,
Chembur-400 071.

Petitioner

versus

1. Mrs.Jyotsna Ashwin Dedhia,
R/o.Shatrunjay Tower, Flat No.804,
Vithal Chavan Marg, Parel,
Mumbai-400 012.

2. The State of Maharashtra.

Respondents

Mr.Rajender Singh Saluja, Advocate for Petitioner.
Mr.Jatin P. Karia (Shah) with Ms.Snehankita Munj, Shraddha
Kamble, Preeti G. for Respondent no.1.
Mr.Arfan Sait, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 24th January 2024

PC :

1. Petitioner is tried for offence u/s.138 of Negotiable Instruments Act vide C.C No.2001048/SS/2018 pending before the Court of Metropolitan Magistrate, 20th Court, at Mazgaon.

2. The complaint was filed by Respondent no.1. The complainant's contention is that Petitioner had approached the complainant and represented that business is being conducted in the name and style of M/s.Sapan Creatives which is a proprietary concern of which Petitioner is proprietress. Complainant had

advanced an amount of Rs.10,00,000/- by way of loan. In discharge of liability accused issued cheque dated 31st October 2017 for an amount of Rs.10,87,500/- which was dishonoured vide memo dated 29th December 2017. Demand notice dated 22nd January 2018 was issued to the accused by complainant. Complaint was filed through Power of Attorney. Power of Attorney holder was the husband of complainant. Verification statement of complainant was recorded and process was issued.

3. Affidavit of examination-in-chief of complainant was tendered before Trial Court on 10th September 2018. The cross examination was conducted at the instance of accused on 28th January 2019. During the cross-examination a suggestion was put to the Power of Attorney holder which was denied by saying that it is not true to say that deponent is not authorized to file any complaint and depose on behalf of complainant.

4. Respondent/complainant preferred application for recalling CW-1 on 21st October 2021. The application was preferred primarily on the ground that details of Power of Attorney was not entered into the register of Notary and complainant has executed another Power of Attorney rectifying previous Power of Attorney. Application was opposed by Petitioner by filing say on 21st October 2021. Vide order dated 16th February 2022 learned Magistrate allowed the application preferred by complainant and the witness was recalled. The order passed by Magistrate was challenged by Petitioner before learned Sessions Judge by preferring Criminal Revision Application No.254 of 2022. The Revision Application was dismissed vide order dated 28th July 2022.

5. Learned advocate for Petitioner submitted that learned Magistrate ought not to have allowed the application for recall of witness. Only suggestion which was put to CW-1 was that he is not authorized to file complaint. Pursuant to the cross-examination of CW-1, application was preferred for recalling the witness. Since cross-examination discloses defense of accused, it was not permissible to recall the witness. Learned Magistrate as well as learned Sessions Judge failed to consider the fact that application was preferred by Respondent to fill up the lacuna. The impugned orders are against the spirit of Section 311 of Code of Criminal Procedure. Respondent cannot be allowed to bring on record new Power of Attorney to cover up the discrepancy which was existing in the previous Power of Attorney. The complainant tried to cure lacuna by bringing on record new Power of Attorney by ratifying power given to the Power of Attorney holder vide previous Power of Attorney. Learned Magistrate and learned Sessions Judge has considered several decisions relied upon by learned advocate for complainant. Most of the decisions relied upon by complainant are relating to authorization filed on behalf of company. Said decisions are not applicable to the facts of present case. Learned Sessions Judge while adjudicating revision application has held that impugned order was interlocutory and revision application is not maintainable. However, learned Judge has rejected the application on merits. The new Power of Attorney contains certain details which were not appearing in the first Power of Attorney. Complainant is trying to cure the defect in respect to the entry which is not made in the register of Notary. Application was afterthought and hence ought not to have been allowed by Trial Court and Sessions Court.

6. Learned advocate for Respondent Mr.Jatin Shah submitted that

complainant cannot be precluded from recalling the witness to place on record limited aspect as stated in the application. Learned Magistrate has allowed the application by stating reasons. The order of Magistrate is confirmed by Sessions Court. Pursuant to the cross-examination, Respondent had preferred application before Magistrate as there was no entry of Power of Attorney in the register of Notary. Bringing on record new Power of Attorney which ratifies Power of Attorney, does not tantamount to filling up of lacuna in accordance with Section 311 of Cr.P.C. It is also permissible to ratify the contents of previous Power of Attorney. There is no infirmity in the order passed by Trial Court and Sessions Court. Hence no interference is warranted in the impugned orders.

7. Mr.Shah has relied upon following decisions :

- (i) Sab Retail Solutions Vs. R.R.Enterprises (Order of this Court in Criminal Writ Petition No.597/2023, dated 1.3.2023);
- (ii) Grafitek International Vs. K.K.Kaura – 2002(62)-DRJ-72;
- (iii) Haryana State Coop Supply Vs. Jayam Textiles (2014)4-SCC-704;
- (iv) M.M.T.C.Ltd Vs. Medchl Chemicals & Pharma – (2002)1-SCC-234;
- (v) United Bank of India Vs. Naresh Kumar – 1996(6)-SCC-660;
- (vi) Ashwin Holdings Vs. Anthony Fernandez – 2021-SCC OnLine-Bom-852;
- (vii) Michael Gabriel Vs Sheth Builders – 2020-SCC OnLine-Bom-9042;
- (viii) Shree Swami Samarth Construction Vs. Simala Jayant Maru (Order of this Court in Criminal Revision Appln.No.1141/2019, dated 9-3-2020);

(ix) Shree Swami Samarth Construction Vs. Simala Jayant Maru (Order of DB this Court in Criminal Writ Petition No.113/2022, dated 5-5-2022).

8. It is not in dispute that complaint was filed through Power of Attorney. The Power of Attorney dated 20th February 2018 indicates that husband of complainant has been authorized to file complaint. During the cross-examination of complainant CW-1 has stated that it is not true to say that witness is not authorized to file complaint and depose on behalf of complainant. On perusal of Power of Attorney dated 20th February 2018 it can be seen that entry thereof was not made in the register of Notary. The Respondent preferred application for recalling CW-1. In the application it was stated that for bringing on record additional evidence and documents in respect and in support of his authorization over and above the documents which are already produced on record in respect of authority. It was further stated that by way of abundant precaution in order to remove any ambiguity, doubts of whatsoever nature which may arise in respect of genuineness, authenticity, execution thereof in respect of the said Power of Attorney in furtherance as well as in continuation of the said Power of Attorney has decided to once again appoint, nominate, constitute Mr.Ashwin Shamji Dedhia to be his true and lawful attorney. It is stated that although the Power of Attorney was duly signed and executed before Notary Public, purely due to oversight and inadvertence, the details pertaining to execution of said Power of Attorney was not entered into Notarial Register of the Notary who had duly notarized the said Power of Attorney. Learned Magistrate while allowing said application had observed that aim of every Court is to discover the truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a Court in its effort to ferret out the truth by procedure sanctioned by law. It was

observed that it is not the case of complainant that Ashwin Dedhia is not power of Attorney holder or no power of attorney was executed by Jyotsana Ashwin Dedhia. Therefore, it not an act of filling lacuna. Authorization is really a matter of concern and crucial point and opportunity of proving the same needs to be granted to the complainant. It is pertinent to note that learned Magistrate has also observed that without commenting upon the probative value or evidentiary value of proposed document a right of complainant cannot be taken away to prove his case when an amount of Rs.10,87,500/- is involved in the transaction and at the same time it has to be considered that accused has every right to cross examine the CW-1 on the said point. In the absence of proposed/subsequent power of attorney it cannot be said that complainant has totally failed to prove his authorization and complaint can be dismissed. After giving due opportunity to other side, the Court has to decide the matter on merits instead of technicalities. Learned Magistrate has also referred to the decisions relied upon by advocate for complainant. Learned Sessions Judge has confirmed the order of Magistrate. It is true that the Court also observed that the order was interlocutory and also made observations on the merits of case. However, order indicates that several decisions were considered by Sessions Court while confirming impugned order.

9. Apparently pursuant to the impugned orders, CW-1 had stepped into the witness box and further examination-in-chief has been recorded and photocopy of new Power of Attorney has been taken on record as Exhibit-52. However, the cross-examination was not conducted. Said orders are under challenge before this Court.

10. This Court in the case of Sub Retail Solutions Vs.

R.R.Enterprises (supra) had dealt with similar situation. The factual matrix of the case decided on 1st March 2023 indicate that application was moved with prayer for recalling complainant for bringing on record fresh power of attorney. It was a case u/s.138 of Negotiable Instruments Act. The Power of Attorney was not filed with complaint. First witness was examined and he had referred to Power of Attorney. The Power of Attorney gave power to file complaint in respect to dishonour of cheque and to give evidence in the case. Cross examination of witness was conducted and in the cross examination he deposed that there is no mention in the Power of Attorney about the specific name of accused firm for filing the case. There is no mention in Power of Attorney about the Power of Attorney entered in the register of notary. Thereafter the complainant preferred application for production of fresh Power of Attorney. The accused contended that it was an attempt to fill up lacuna. It was observed by Court that, PW-1 filed complaint as Power of Attorney of his wife. In complaint averment in that regard was made. Power of Attorney was produced. It was marked as Exhibit. Merely because the Power of Attorney does not bear registration number from register of Notary, the same would not become non-est document. No prejudice would be caused by granting application. The accused can argue that subsequent Power of Attorney may be of no avail.

11. In the present case learned Magistrate has observed that without commenting upon the probative value or evidentiary value of proposed document a right of complainant cannot be taken away to prove his case when an amount of Rs.10,87,500/- is involved in the transaction.

12. In the case of M/s.Haryana State Coop. Supply and Marketing Federation Ltd (supra), Hon'ble Supreme Court has observed as follows :-

“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.”

13. In the case of M.M.T.C. Ltd and Medchl Chemicals & Pharma (supra), the Hon'ble Supreme Court has considered similar issue to permit authorization. It was observed that even presuming that initially there was no authority, still the company can, at any stage, rectify that defect. At a subsequent stage, the company can send a person who is competent to represent the company. Learned counsel for Petitioner, however, submitted that most of the decisions are in respect of companies as the authorized persons keep on changing. However, as far as principles which are enunciated and the decisions which are referred above whether such permission can be denied and whether it amounts to filling up of lacuna is the question.

14. As stated above, the first Power of Attorney authorized CW-1 to file complaint. By way of abundant caution complainant wants to bring on record second Power of Attorney. The probative and evidentiary value of the same will be decided at appropriate stage. Hence no interference is called for in the impugned orders.

ORDER

- (i) Criminal Writ Petition No.3186 of 2022 is dismissed.

(PRAKASH D. NAIK, J.)

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