

M/S. Shankar Finance & Investments vs State Of A.P. & Ors on 26 June, 2008

Equivalent citations: AIR 2009 SUPREME COURT 422, 2008 AIR SCW 7493, 2011 ACD 453 (SC), 2009 (2) AIR JHAR R 343, 2008 (3) CURCRIR 301, 2008 (3) SCC(CRI) 558, 2008 (10) SCALE 654, 2008 (8) SRJ 135, 2008 (8) SCC 536, 2009 (2) BOM CR(CRI) 159, 2009 (1) BANKCLR 908, 2008 (3) RECCRIR 885, (2008) 3 JCC 345 (SC), 2009 (1) GUJLH 297, (2009) 1 CRILR(RAJ) 161, 2008 (4) CHANDCRIC 81, (2009) 4 ALLMR 480 (SC), 2008 (4) BANKCAS 523, (2008) 3 CIVILCOURTC 586, (2008) 2 NIJ 532, (2008) 10 SCALE 654, 2009 CRILR(SC MAH GUJ) 161, (2008) 3 MAD LJ(CRI) 1137, (2008) 41 OCR 215, (2008) 4 MPHT 339

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Bench: P. Sathasivam, R. V. Raveendran

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1449 OF 2003

M/s. Shankar Finance & Investments

..... Appellant

Versus

State of Andhra Pradesh & Ors.

.....

Respondents

ORDER

R. V. Raveendran J.

The complainant in a proceedings under section 138 of the Negotiable Instruments Act, 1881 ('Act' for short), challenges in this appeal by special leave, the order dated 21.8.2002 passed by the Andhra Pradesh High Court in Criminal Petition No.1737 of 2001 holding that the complaint signed by a Power of Attorney holder was not maintainable.

2. The appellant - complainant filed a complaint dated 2.4.1996 against respondents 2 to 4 herein (namely M/s Speciality Aqua Ventures Ltd, its Managing Director and Chairman arrayed as accused 1, 2 and 3) alleging that a cheque for Rs.12,40,000/- issued by the third respondent (on behalf of respondents 2 to 4) was dishonoured. Respondents 2 and 4 filed an application seeking discharge. The said petition was dismissed by the learned Magistrate by order dated 17.12.1998. The Revision filed by them against the order of the learned Magistrate was rejected by the Sessions Court on 12.2.2001. Thereafter, the fourth respondent herein (third accused) filed a petition under section 482 Cr.PC for quashing the proceedings. The fourth respondent contended that he could not be arrayed as an accused as the cheque was issued by the third respondent in his individual capacity. The High Court allowed the said petition on a different ground, by order dated 21.8.2002, and quashed the complaint as against the fourth respondent. It held that the complaint was not signed by the payee, that is, the sole proprietor of the payee concern, but was signed by his Power of Attorney Holder and that was not permissible.

3. The said order of the High Court is challenged in this appeal by special leave. By interim orders dated 28.11.2003 and 2.4.2004, this Court stayed the operation of the order of the learned Single Judge and directed that the case should be proceeded with.

4. The question that arises for our consideration is whether the complaint under section 138 of the Act signed by a Attorney holder is not maintainable.

5. Section 190 of Code of Criminal Procedure (`Code' for short) enables a Magistrate to take cognizance of an offence upon receiving a complaint of facts which constitutes such offence. Section 200 of the Code requires the Magistrate taking cognizance of an offence on complaint, to examine upon oath the complainant and the witness present, if any. Section 142 of the Act provides that notwithstanding anything contained in the Code, no Court shall take cognizance of any offence punishable under section 138 of the Act except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque.

6. In MMTC Ltd. vs. MEDCHL Chemicals & Pharma (P) Ltd. - 2002 (1) SCC 234, a complaint was filed by MMTC Ltd. through the Manager of its Regional Office. Subsequently, the Manager was substituted by Dy. General Manager who was duly authorized. The High Court held that the complaint was not maintainable as it was signed and presented by a person, who was neither an authorized agent nor a person empowered under the articles of association or by any resolution of the Board to do so. It held that only the Executive Director of MMTC Ltd had the authority to institute legal proceedings. Reversing the said decision, this Court held :

"In our view the reasoning given above cannot be sustained. Section 142 of the Negotiable Instruments Act provides that a complaint under section 138 can be made by the payee or the holder in due course of the said cheque. The two complaints, in question, are by the appellant company who is the payee of the two cheques.

This Court has as far back as in the case of Vishwa Mitter v. O.P. Poddar - (1983) 4 SCC 701, held that it is clear that anyone can set the criminal law in motion by filing a

complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the Statute. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the appellant company."

(Emphasis supplied) Referring to the decision in *Associated Cement Co. Ltd. v. Keshvanand* [1998 (1) SCC 687], this Court held :

"It has further been held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. Thus, 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. The complaints could thus not have been quashed on this ground."

7. The payee of the cheque is M/s Shankar Finance & Investments. The complaint is filed by "M/s Shankar Finance & Investments, a proprietary concern of Sri Atmakuri Sankara Rao, represented by its power of Attorney Holder Sri Thamada Satyanarayana". It is therefore evident that the complaint is in the name of and on behalf of the payee. Section 142(a) of the Act requires that no Court shall take cognizance of any offence punishable under section 138 except upon a complaint made in writing by the payee. Thus the two requirements are that (a) the complaint should be made in writing (in contradistinction from an oral complaint); and (b) the complainant should be the payee (or the holder in due course, where the payee has endorsed the cheque in favour of someone else). The payee, as noticed above, is M/s Shankar Finance & Investments. Once the complaint is in the name of the 'payee' and is in writing, the requirements of section 142 are fulfilled. Who should represent the payee where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by section 142, but by the general law.

8. As contrasted from a company incorporated under the Companies Act, 1956 which is a legal entity distinct from its shareholders, a proprietary concern is not a legal entity distinct from its proprietor. A proprietary concern is nothing but an individual trading under a trade name. In civil law where an individual carries on business in a name or style other than his own name, he cannot sue in the trading name but must sue in his own name, though others can sue him in the trading name.

Therefore, if the appellant in this case had to file a civil suit, the proper description of plaintiff should be "Atmakuri Sankara Rao carrying on business under the name and style of M/s Shankar Finance & Investments, a sole proprietary concern". But we are not dealing with a civil suit. We are dealing with a criminal complaint to which the special requirements of section 142 of the Act apply. Section 142 requires that the complainant should be payee. The payee is M/s Shankar Finance & Investments. Therefore in a criminal complaint relating to an offence under section 138 of the Act, it is permissible to lodge the complaint in the name of the proprietary concern itself.

9. The next question is where a proprietary concern carries on business through an attorney holder, whether the attorney holder can lodge the complaint? The attorney holder is the agent of the grantor. When the grantor authorizes the Attorney Holder to initiate legal proceedings and the attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder, and not by the attorney holder in his personal capacity. Therefore where the payee is a proprietary concern, the complaint can be filed : (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the 'payee'; (ii) The proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and

(iii) the proprietor or the proprietary concern represented by the attorney- holder under a power of attorney executed by the sole proprietor. It follows that in this case the complaint could have been validly filed by describing the complainant in any one of the following four methods :

"Atmakuri Shankara Rao, sole proprietor of M/s. Shankar Finance & Investments"

Or "M/s. Shankar Finance & Investments a sole proprietary concern represented by its proprietor Atmakuri Shankara Rao"

Or "Atmakuri Shankara Rao, sole proprietor of M/s. Shankar Finance & Investments, represented by his Attorney Holder Thamak Satyanarayana"

Or "M/s. Shankar Finance & Investments, a proprietary concern of Atmakuri Shankara Rao, represented by his Attorney Holder Thamada Satyanarayana".

What would have been improper is for the Attorney holder Thamada Satyanarayana to file the complaint in his own name as if he was the complainant.

10. This Court has always recognized that the power of attorney holder can initiate criminal proceedings on behalf of his Principal. In Ram Chander Prasad Sharma v. State of Bihar and Anr. [AIR 1967 SC 349], the prosecution was commenced in regard to tampering of electric meter seals, with a charge sheet submitted by the police after investigation on a first information report by one Bhattacharya, Mains Superintendent of Patna Electric Supply Co. ('PES Co.' for short). An objection was raised by the accused that the prosecution was incompetent as it was not launched by a person competent to do so. The said objection was based on section 50 of the Indian Electricity Act, 1910, which provided that no prosecution shall be instituted against any person for any offence against

that Act or any rule, licence or order thereunder, except at the instance of the Government or an Electric Inspector, or of a person aggrieved by the same. This Court held :

"... The P.E.S. Co., however, is a body corporate and must act only through its directors or officers. Here we have the evidence of Ramaswami to the effect that he held a general power of attorney from the P.E.S. Co., and that he was specifically empowered thereunder to act on behalf of P.E.S. Co., in all legal proceedings. The evidence shows that it was at his instance that Bhattacharya launched that first information report and, therefore, it would follow that the law was set in motion by the "person aggrieved". The objection based on Section 50 must, therefore, be held to be untenable."

(emphasis supplied)

11. The assumption of the High Court that where the payee is a proprietary concern, the complaint can be signed only by the proprietor of the proprietary concern and not by a Power of Attorney holder of the proprietor, is not sound. It is not in dispute that in this case a power of attorney has been granted by Atmakuri Shankara Rao, as Proprietor of M/s Shankar Finance & Investments in favour of Thamada Satyanarayana and the same was produced along with the complaint. The description of the complainant is as under :

"M/s Shankar Finance and Investments, (a proprietary concern of Sri Atmakuri Sankara Rao S/o Late Sri A. B. Rama Murthy, Hindu, aged about 65 years), having its office at Flat No.3B, Third Floor, Maharaja Towers. Vishakhapatnam - 3 represented by its Power of Attorney Holder Sri Thamada Satyanarayana, S/o Late Adinarayana, Hindu, aged 50 years, Service, residing at MIG-B-230, Sagarnagar, VUDA Layout, Vishakhapatnam - 43."

The said description is proper and therefore, the complaint has been duly filed by the payee.

12. The High Court has referred to the fact that the sworn statement before the learned Magistrate was of the attorney holder of the payee and not by the payee in person. According to the tenor of the order of the High Court, this was also irregular. But we find nothing irregular in such a procedure. It is now well settled that the object of section 200 of the Code in providing for examination of the complainant and his witnesses by the court is to satisfy itself about the existence of a prima facie case against the person accused of the offence and to ensure that such person is not harassed by false and vexatious complaints by issue of process; (See *Nirmaljit Singh Hoon v. State of West Bengal* - 1973 (3) SCC 753). Where the proprietor of the proprietary concern has personal knowledge of the transaction and the proprietor has signed the complaint, he has to be examined under section 200 of the Code. A power of attorney holder of the complainant who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the payee- complainant and the Attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the payee-complainant, there is no reason why the attorney holder cannot be examined as the complainant. We may, in this

connection, refer to the decision of this Court in *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.* [2005 (2) SCC 217], where the scope of an attorney holder 'acting' on behalf of the principal in a civil suit governed by Code of Civil Procedure was examined. This Court observed:

"Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by them power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include depositing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

[Emphasis supplied] The principle underlying the said observations will apply to cases under section 138 of the Act. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined. Of course, where the cheque is drawn in the name of the proprietor of a proprietary concern, but an employee of such concern (who is not an attorney holder) has knowledge of the transaction, the payee as complainant and the employee who has knowledge of the transaction, may both have to be examined. Be that as it may. In this case we find no infirmity.

13. We, accordingly, allow this appeal, set aside the impugned order dated 21.8.2002 and direct the learned Magistrate to proceed with the complaint as already directed by the interim order.

.....J [R. V. Raveendran]J [P. Sathasivam] New Delhi;

June 26, 2008.