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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 3313 OF 2009

Vilas Baliram Sawant,
Aged about 55 years,
Occupation Service,
Constituted Attorney
Mr. Bhaskar Sakharam
Bandiwadekar residing
at 2-B-303, N.G.Park
Raval Pada, Dahisar
Mumbai – 400 068.

.. Petitioner

Versus

1 Smt. Mayuri Y. Shah,
sole proprietress of
Messers Marco Plast
Corporation, Plot No.D.Survey
No.43/5/6 Mahim Road,
Village Ali Yali,
Post Tembhode Palghar West,
Dist. Thane.

2 The State of Maharashtra.

.. Respondents

Mr.V.V.Pai for the Petitioner.

Mr. Kishor N. Bhatia for the Respondent no.1.

Ms. S.V.Gajare, A.P.P. for the Respondent no.2/State.

CORAM : J. H.BHATIA, J.

DATE : 18TH AUGUST, 2010

JUDGMENT:

1 Heard the learned counsel for the parties.

2 The complainant has preferred this Writ Petition challenging the order passed by the Additional Sessions Judge, Greater Mumbai in the Criminal Revision Petition No. 1275 of 2008, whereby he quashed the process issued by the Magistrate under section 138 of the Negotiable Instruments Act against the accused, who is Respondent no.1 before this court.

3 To state in brief, the complaint was filed by one Vilas Baliram Sawant claiming to be constituted attorney for one Bhaskar Sakharam Bandiwadekar. Said Bhasker Sakharam Bandiwadekar is proprietor of RABTURNS which is a Proprietorship concern. The accused had allegedly purchased certain goods from RABTURNS for consideration of Rs.3,00,000/- and it was agreed that he would make initial payment of Rs.1,50,000/- and balance amount of Rs.1,50,000/- would be paid on the

delivery of machines. Accordingly, the accused made payment of Rs.1,50,000/-, machines were supplied and the accused issued a cheque dated 10.03.2008 for amount of Rs.1,50,000/- in favour of RABTURNS against his account maintained with Bank of India, Ghatkopar (East) Branch. The cheque was presented for encashment but it was returned on 10.05.2008 with endorsement "payment stopped by the drawer". In spite of notice no payment was made. Hence, the complaint.

4 As stated above, the complaint was not filed either by Bhasker Sakharam Bandiwadekar as the proprietor of RABTURNS nor by the proprietorship concern namely, RABTURNS through its proprietor Bhasker Sakharam Bandiwadekar nor by either of them through Constituted Attorney. The complaint was filed by Vilas Baliram Sawant, who claims to be constituted attorney of Bhasker Sakharam Bandiwadekar. His verification statement was recorded by the Magistrate and the process was issued. That order was quashed in Revision Application by the Sessions Court.

Section 142 (a) of the Negotiable Instruments Act, 1881, clearly provides that no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. In the present case, the proprietorship is concern RABTURNS was the payee of the cheque. Therefore, the complaint under section 138 of the Negotiable Instruments Act, 1881 could be filed either by the RABTURNS the proprietorship concern through its proprietor or could be filed by Bhaskar Sakharam Bandiwadekar as proprietor of RABTURNS who was a payee. In the present case, a complaint was not filed either by the RABTURNS or by Bhaskar Sakharam Bandiwadekar. Complaint was filed by the complainant, who claims to be constituted attorney.

5 The learned counsel for the Applicant relied upon **Shanker Finance & Investments vs. State of Andhra Pradesh, ALL MR 2009 (4) 480**, in support of his contention that the complaint could be verified by the power of attorney holder if he has personal knowledge of all the facts leading to

the complaint. On perusal of the said judgment, it appears that in that case the complaint was filed by payee M/s Shanker Finance & Investments and the title was 'M/s Shankar Finance & Investments, a proprietary concern of Sri Atmakuri Shankara Rao, represented by its power of Attorney Holder Sri Thamada Satyanarayana'. But the complaint was signed by the power of attorney holder on behalf of the complainant and he also verified it. It was contended that the complaint could not be filed through power of attorney holder. The Supreme Court observed thus:

"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.”

6 From the above observations it become clear that either proprietor could have filed the complaint in his own name as proprietor of RABTURNS or RABTURNS could have filed the complaint represented through its proprietor or the proprietor of RABTURNS could have been filed through power of attorney holder or the payee RABTURNS could have filed the complaint through power of attorney holder. The Supreme Court made it clear that what would have been improper is for the attorney holder to file the complaint in his own name as if he was a complainant. In the present case, exactly the same mistake was committed and the complaint was filed by the power of attorney holder Vilas Baliram Sawant in his own name as constituted attorney of Bhasker Sakharam Bhandiwadekar. Vilas Baliram Sawant was neither payee nor the holder of the cheque in due course and therefore, in view of the provisions of the section 142 (a) of the Negotiable Instruments Act, he could not have filed a complaint and this legal position is clarified by the detail examples and illustrations given by the Supreme Court in **Shanker Finance & Investments** itself.

7 Coming to the question of verification, the Supreme Court in **Shanker Finance & Investments** observed thus:

“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.”

From this it will be clear that where the proprietor of the proprietary concerned has personal knowledge and he has signed the complaint he has to be examined under section 200 of the Criminal Procedure Code for verification of the complaint and if the power of attorney holder is in charge of the business of the payee complainant and he alone is the person aware of the transactions and he has also signed the complaint, there can be no

objection if he makes a statement in verification thereof. However, if the power of attorney is not in-charge of the business and he does not have the personal knowledge, he cannot make a statement under section 200 of the Criminal Procedure Code, to verify the facts in the complaint.

8 Paragraph no.2 of the complaint reads thus:

“2. The complainant is authorized by the proprietor of “RABTURNS” MR. BHASKAR S. BHANDIWADEKAR to file this present complaint against the above named accused person hence the complaint is filing the present complaint. The complainant further states that the has been fully conversant with the facts of the present case.”

In the complaint in the present case, it is no where mentioned that Vilas Baliram Sawant himself was carrying on the business on behalf of the payee and that he alone was conversant with the transactions though the transactions were entered into on behalf of the payee i.e. RABTURNS. He has made a bald statement that he has been fully conversant with the facts

of the present case, without any details as to how he became conversant with the same. In view of the circumstances, I find that the learned Additional Sessions Judge was right in holding, the complaint was not properly verified and could not have been verified by such power of attorney.

9 In the present case, the complaint was filed by the person who was neither payee nor the holder of the cheque in due course and thus it was in violation of the provisions of section 142 (a). Secondly, the complainant Vilas Baliram Sawant nowhere claimed that he had entered in to the transactions on behalf of the payee and that he alone was conversant with the said transactions of the business, therefore, also he could not verify the complaint. In view of the circumstances, I find no fault with dismissal of the complaint.

10 For the aforesaid reasons, the Petition stands disposed of.

(J.H.BHATIA, J.)