

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 8th NOVEMBER, 2016

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.11 of 2015

Appellant : KAIL Limited,
previously known as Kitchen Appliances India Ltd.,
Registered Office C-6, Ashok Steel Compound,
159, C.S.T. Road, Kalina Santacruz (E),
Mumbai – 400 098
Registered Branch Office at
3, Sarat Bose Road, Hakim Para,
WBSC Card Bank Ltd., 2nd Floor,
Siliguri – 734 001,
through its Constituted Power of Attorney Holder
Mr. Manoj Bhattacharyya,
R/o Block – BP, Sector V,
Salt Lake City, Kolkata – 700 091.

versus

Respondent : 1. Mr. Jamel Akhtar,
S/o Abdul Aziz,
Proprietor of M/s. New Alpha Electronics,
Central Bank Building, Ground Floor,
Gyalshing, West Sikkim,
Resident of House No.59,
Village and Street Gyalshing,
P.S. Gyalshing,
District West Sikkim.

2. State of Sikkim
through the Chief Secretary,
Government of Sikkim,
Gangtok.

Application under Section 378(4) read with Section
482 of the Code of Criminal Procedure, 1973

Appearance

Mr. Manish Jain, Advocate for the Appellant.

Mr. Ajay Rathi, Ms. Phurba Diki Sherpa and Mr. Rahul Rathi,
Advocates for Respondent No.1.

Mr. S. K. Chettri, Assistant Government Advocate for Respondent
No.2.

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J U D G M E N T

Meenakshi Madan Rai, J.

1. Assailing the Order of the Learned Judicial Magistrate (West), Sikkim at Gyalshing, in Private Complaint Case No.1 of 2015 dated 20-04-2015, in which the Learned Trial Court discharged the Respondent No.1 under Section 138 of The Negotiable Instruments Act, 1881 (in short "the Act of 1881"), the instant Appeal has been preferred.

2. The Appellant's case briefly stated is that, it is a Public Limited Company incorporated under the Companies Act, 1956, under the name and style "KAIL LIMITED", on a Certificate issued by the Deputy Registrar of Companies, Mumbai on 21-01-2008. Formerly it was known as "Kitchen Appliances India Limited" but the change in name does not preclude it from initiating and continuing legal proceedings in its new name. The Company is engaged in the sale and purchase of electronic items, such as, colour TV, VCD, DVD through its Branch Offices, which include Asansol, Siliguri and other places. The Respondent No.1/Accused is the Proprietor of a Firm known as "M/s. New Alpha Electronics" also doing business in electronic products and is run by the Respondent No.1. The Respondent No.1 entered into a Dealership Agreement with the Appellant Company and also opened a Credit Account with the Lucknow Branch of the Appellant Company, in the name of its Firm and obtained various electronic items from time to time on credit from the Appellant Company. Consequently, a sum of Rs.5,54,037/- (Rupees five

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lakhs fifty four thousand and thirty seven) only, was due and payable by the Respondent No.1 to the Appellant Company, for which he issued a Cheque bearing No.359607 dated 16-12-2010 for a sum of Rs.5,54,037/- (Rupees five lakhs fifty four thousand and thirty seven) only, drawn on the State Bank of India, Pelling Branch in favour of "Kitchen Appliances India Ltd." as payment. The said Cheque was duly signed by the Respondent No.1 as the Proprietor of his Firm. The Appellant Company deposited the said cheque on 12-01-2011 for realisation before its Banker HDFC Bank Limited, Aurangabad Branch, but was dishonoured with the remark "insufficient funds" vide Memo dated 09-02-2011, information of which was given by the bank and received by the Appellant on 23-02-2011. The Appellant then issued a legal Notice dated 18-03-2011 to the Respondent No.1 calling upon him to pay the amount of the dishonoured Cheque as per the statutory period of fifteen days, from the date of service of Notice on him. The Notice was sent through Registered AD at the usual place of business of the Respondent No.1, but was returned with the remarks "*addressee out of station hence rtd to sender*". That, the Notice is deemed to have been served.

3. The Appellant duly appointed Mr. Manoj Bhattacharyya on 15-01-2013 as its Constituted Attorney and authorised him to file, defend and depose on behalf of the Company being conversant with the transactions of the various debtors and dealers of the Company. It was also averred that earlier the matter was filed before the Court of the 9th Judicial

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Magistrate, First Class, Aurangabad, who vide his Order dated 16-12-2014 relying on the Judgment of ***Dashrath Roopsing Rathod vs. State of Maharashtra and Another***¹ held that the territorial jurisdiction of the case did not vest in his Court, the Cheque being dishonoured in Pelling Branch, hence, the Complaint before the Court of the Learned Judicial Magistrate, West Sikkim at Gyalshing. In view of all of the above, the Respondent No.1 has committed an offence under Section 138 of the Act of 1881.

4. The Learned Trial Court after considering the pleadings, documents on record and examining the Power-of Attorney Holder summoned the Respondent No.1. After hearing the submissions of Learned Counsel however the Learned Trial Court discharged him of the offence under Section 138 of the Act of 1881.

5. Before this Court, it was argued by Learned Counsel for the Appellant that although the Notice sent by Registered AD was returned with the report that the addressee was out of station, in view of Section 27 of The General Clauses Act, 1897 and Section 114 of The Indian Evidence Act, 1872, it is assumed that the Notice was duly served. On this count, reliance was placed on ***C. C. Alavi Haji vs. Palapetty Muhammed and Another***². It was further contended that the Power-of-Attorney holder has been duly authorised by the Company to file the Complaint and, therefore, the Learned Trial Court erred in rejecting the Complaint only on the ground that the document was a photocopy. Relying

1. (2014) 9 SCC 129

2. (2007) 6 SCC 555

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only on the ground that the document was a photocopy. Relying on the decision of ***A. C. Narayanan vs. State of Maharashtra and Another***³ it was urged that the Power-of-Attorney holder can appear for the principal. The Learned Trial Court had also observed that no *prima facie* case was found against the Respondent No.1, but the Cheque itself was sufficient to prove a *prima facie* case. It was further argued that "Kitchen Appliance India Limited" and "KAIL" are one and the same Company and there has merely been change in the name of the Company, hence the impugned Order be set aside.

6. *Per contra*, the arguments put forth by the Respondent No.1. was that in the first instance the Complaint does not mention the name of the Power-of-Attorney holder neither does the signature of the Attorney holder appear in the photocopy of the "*General Power of Attorney*" filed before the Learned Trial Court. That, Annexure 2 which pertains to change of the name from "Kitchen Appliances India Limited" to "KAIL LIMITED" allegedly effected in November, 2008, was filed only before this Court and not before the Learned Trial Court and therefore, cannot be taken into consideration. Since the Agreement, Annexure 4, pertained to the Respondent No.1 and Kitchen Appliances India Limited and not KAIL and the Cheque in question is also made out to Kitchen Appliances India Ltd. in the year 2010, the Respondent No.1 has no lawful debt or liability towards the Appellant and the Appellant has no *locus standi*. It

3. (2014) 11 SCC 790

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was further contended that the Statement of Accounts showing the dues as reflected in the Cheque or Way Bills have not been revealed, this being necessary in view of the fact that the alleged dues is said to be Rs.5,54,347/- (Rupees five lakhs fifty four thousand three hundred and forty seven) only, but to the contrary, the credit limit allowed to the Respondent No.1, in terms of Annexure 4 extends only Rs.1,50,000/- (Rupees one lakh and fifty thousand) only. It is the specific contention of the Respondent No.1 that blank Cheques were taken by way of security by Kitchen Appliances India Limited when the Agreement was executed which are now being misused by KAIL. It was also urged that assuming KAIL came into existence after change of name, no new Agreement was signed between the Respondent No.1 and KAIL. That, although the Appellant alleges that both "Kitchen Appliances India Limited" and "KAIL" are 'Limited Companies' which prove that they have Equity Shares, but no evidence has been furnished by the Appellant to reveal that the Share Holders were informed of the change of name. However, he admits receipt of Notice. To buttress his submissions, he has placed reliance on ***Govind Ram Chanani vs. Latha and Another***⁴, ***Mrs. Alka Toraskar vs. The Vaishya Urban Co-op. Credit Society Ltd. and Another***⁵, ***Om Shakthi SC/ST and Minority Credit Co-operative Society Ltd. vs. M. Venkatesh***⁶ and ***Prasanta Kumar Basu vs. Narendra Kumar Anchalia and Another***⁷. It is urged that the Order of the Learned Judicial Magistrate, West, being a reasoned Order requires no interference by this Court.

4. 2009 CRI.L.J. 2154 (Karnataka)

5. 2007 CRI.L.J. 858 (Bombay)

6. 2008 CRI.L.J. 998 (Karnataka)

7. 2007 CRI.L.J. 1026 (Calcutta)

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7. I have heard the rival contentions of Learned Counsel for the parties at length and given due consideration. I have also perused the records of the Learned Trial Court along with the documents and provisions of the Laws relied on and perused the impugned Order and the citations made at the Bar.

8. Bearing in mind the arguments advanced at the Bar, the question that falls for consideration before this Court is whether the impugned Order is incorrect or illegal?

9. Addressing the first argument of the Appellant that Notice is deemed to be served in terms of Section 27 of The General Clauses Act, 1887 and Section 114 of The Indian Evidence Act, 1872, it is pertinent to recall here that Learned Counsel for the Respondent No.1 fairly conceded receipt of Notice. In view of this admission, this point does not require a verbose discussion the admission having given a quietus to this issue.

10. Now, coming to the matter germane to the issue at hand is, whether the Power-of-Attorney holder can represent the Appellant Company, with a photocopy of the said document?

11. We may firstly refer to the provision of Section 142 of the Act of 1881, which for the sake of convenience, is being extracted hereinbelow;

"142. Cognizance of offences.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made

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by the payee or, as the case may be, the holder in due course of the cheque;

- (b) such complaint is made within one month of the date on which the cause-of-action arises under clause (c) of the proviso to section 138 :

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

- (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138."

Thus, in terms of the above provision, no Court shall take cognizance of any offence punishable under Section 138 of the Act of 1881, 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 light of the above provision, we may now examine whether the Power-of-Attorney is legally acceptable in the instant case. It was argued by the Appellant that the Power-of-Attorney did not bear the name of the Power-of-Attorney holder neither did the Complaint mention his name. Perusal of the Complaint before the Learned Judicial Magistrate and perusal of the "*General Power of Attorney*" would belie this submission as both bear the name of "Manoj Bhattacharyya" the Power-of-Attorney holder and therefore, this argument of Learned Counsel for the Respondent No.1 is no legs to stand. That, having been said, we may now gainfully refer to the decision in **A. C. Narayanan**³ (*supra*) wherein it was held as follows;

"30. In the light of the discussion, we are of the view that the power-of-attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the

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power-of-attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the power-of-attorney holder about the transaction in question must be specified in the complaint.

.....

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."

12. In the instant case although the Power-of-Attorney has been filed by the holder of the document, however, as pointed out in the impugned Order the same is in photocopy. The document filed before the Learned Trial Court, i.e., the General Power of Attorney, also does not bear the original signature of either the person granting the authorisation or the person being so authorised. Besides, although the General Power of Attorney is said to have been issued by the Company's Director Shri Shankar S/o Sonaji Khande, his signature has not been identified on the document. Undoubtedly, the Power-of-Attorney empowers an agent to affect his principal's position by doing acts on his behalf, the relationship perhaps arising out of an ailment, old age or other inconveniences of the principal or when the Company as a juristic person authorises a representative. It is also settled Law that a Manager or any other person authorised by the Company can represent it during the course of legal proceedings before the Court and he can also file a complaint. However, the restriction that extends to the Power-of-Attorney holder is that he cannot depose for the principal in respect of facts which are not in his

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personal knowledge. This has succinctly been laid down in ***Janki Vashdeo Bhojwani and Another vs. Indusind Bank Ltd. and Others***⁸ which was referred to in ***A. C. Narayanan***³ (*supra*). But when a document is in photocopy with the signatures also in photocopy, it is legally not tenable to accept the document and to allow its contents in evidence and therefore, to allow the Power-of-Attorney holder to represent the Company. No reasons have been put forth for non-filing of the original Power-of-Attorney or for that matter a certified copy of the said document.

13. With regard to Annexure 2, as pointed out by Learned Counsel for Respondent No.1 this document has been filed without the permission of this Court, the same not having been filed in the Magisterial Court and thus merits no consideration. Insofar as debt and liability is concerned, Section 139 of the Act of 1881 comes into play which provides that, it shall be presumed unless the contrary is proved that the holder of a Cheque received the Cheque of the nature referred to in Section 138 of the Act of 1881 for the discharge in whole or in part of any debt or other liability. Of course, the presumption is a “rebuttable presumption”.

14. In view of the discussions hereinabove, I find no error in the Order of the Learned Trial Court which therefore, calls for no interference.

15. In the result, the Appeal is dismissed.

8. (2005) 2 SCC 217

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16. No order as to costs.

Sd/-
(**Meenakshi Madan Rai**)
Judge
08-11-2016

Approved for reporting : **Yes**

Internet : **Yes**

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