

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

SATURDAY, THE 21ST DAY OF NOVEMBER 2015/30TH KARTHIKA, 1937

Crl.Rev.Pet.No. 1206 of 2003 ()

AGAINST THE JUDGMENT IN CRL.APPEAL NO.75/2000 of ADDITIONAL SESSIONS
JUDGE (ADHOC) FAST TRACK COURT NO.1, THRISSUR DATED 09-12-2002

AGAINST THE JUDGMENT IN ST 4391/1996 of JUDICIAL FIRST CLASS
MAGISTRATE, IRINJALAKUDA DATED 29-01-2000

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

M.K. BASHEER, S/O. KUNJIMOIDEEN,
MAMMASRAYILLATH HOUSE,
CLASSIC RUBBER, CHOONDAL P.O.,
THRISSUR DISTRICT.

BY ADV. SRI.P.K.RAVISANKAR

RESPONDENT(S)/STATE & COMPLAINANT:

1. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.
2. APPOLO TYRES LTD.,
PERAMBRA REPRESENTED BY
K.V. NAVANEETHAN (OFFICER LEGAL & EXCISE),
APPOLO TYRES LTD., PERAMBRA.

R2 BY ADV. SRI.K.DIVAKARAN
BY PUBLIC PROSECUTOR SRI. N. SURESH.
BY ADV. SRIP.S.SUJETH
BY ADV. SMT.M.R.REENA

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 21-11-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

acd

'C.R.'

P.D. RAJAN, J.

Crl.R.P.No.1206 of 2003

Dated this the 21st day of November, 2015

ORDER

The revision petitioner was accused in S.T.No.4391/1996 before Judicial Magistrate of First Class, Irinjalakuda u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the N.I. Act). The case against him is that in discharge of a debt, on 30.4.96 the accused issued a cheque for ₹5,49,283/- drawn on Corporation Bank, Kunnamkulam branch to the complainant. When the cheque was presented for encashment through SBT, Chalakudy, it was dishonoured for the reason of funds insufficient. He demanded the amount by giving a notice in writing to the accused, but there was no repayment, hence the complaint.

2. On the side of the complainant, PW1 and PW2 were examined and Exts.P1 to P13 were marked as his documents. The incriminating circumstances brought out in evidence were denied by the accused while questioning him under Section 313 Cr.P.C. Accused examined DW1 and marked Exts.D1 to D3 in support of his defence. Learned Magistrate convicted the accused and sentenced to imprisonment for six months and fine of ₹2500/- with a default sentence for one month. The accused was directed to pay sum of ₹5,49,283/- to the complainant as compensation, in default imprisonment for two months. Against that, he filed Criminal Appeal No.75/2000 before II Additional Sessions Judge (Adhoc), Fast Track Court-I, where the sentence was modified. Being aggrieved by that, the accused preferred this revision petition.

3. The main contention advanced by the revision petitioner is that the power of attorney holder is one Sreekumar and he delegated authorisation to one Jose by another power of attorney. This was done without proper authorisation to represent the Company, therefore the institution of the complaint itself is invalid. The second ground is that the appellate Court received additional evidence without giving opportunity to the revision petitioner which is illegal. These illegalities were not considered by both courts.

4. In reply to the contention, the 2nd respondent contended that as per Ext.P1, Sreekumar, Vice Chairman of the Company was authorised to represent the Company, the resolution was also not filed along with the power of attorney. As per Ext.P2, one Jose J.P. was authorised to

represent the Company but that resolution was not produced before Court. Subsequently, on 24.6.1996 by virtue of Ext.P1, Sreekumar delegated his authorisation to one Navaneethan, however, that authorisation was not produced in the trial Court. Moreover, Jose J.P. and Joseph, who represented the Company as PW1, is one and the same person.

5. The second respondent company is the original complaint and is a juristic person and all acts through its directors who are collectively responsible for its acts. A director, as an individual director has no power to act on behalf of the Company. He is only one of the body of directors, as an individual and he has no power to act unless the board of directors empowers him or given to him by the articles of association of a Company. If one

person is an agent of the company, there needs specific authorisation to act on behalf of the company. In this case one Sreekumar filed a complaint as the Vice Chairman of the Company as per the authorisation of the Board of Directors. The resolution of the Board of Directors was not filed but he filed the power of attorney along with the complaint. Subsequently power of attorney holder delegated his power to another person, but the document with regard to that delegation of power was not produced along with the power of attorney. The consistent view I hold is that in a complaint filed by a Company u/s.138 of the N.I. Act it has to comply the statutory requirement under S.142 (a) of the N.I. Act. Therefore, autorisation, specific delegation and sub delegation has to be mentinoed in the resolution of the Board of Directors or from the

power of attorney. Apex court in Dale and Canington Invt

(P) Ltd and another V. P.K.Prathapan and others (2005(1)

SCC 212, AIR 2005 SC 1624) explained the position as

follows:

".....A company is a juristic person and it acts through its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the Company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. The Directors of companies have been variously described as agents, trustees or representatives, but one thing is certain that the Directors action behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. They are agents of the company to the extent they have been authorized to perform certain acts on behalf of the company. In a limited sense they are also trustees for the shareholders of the company."

Here, the complainant company is a juristic person, it can act through its directors and the company can delegate its

function to a power of attorney holder. If an individual director acts on behalf of the company and the company by a resolution has to specify such power, and if such delegation by way of power of attorney is given, he has to explain the extent of the power given to the power of attorney holder in the power of attorney.

6. Normally Court will not non suit a person on the ground of technicalities. However, the question of competency to institute a prosecution under S.138 of the N.I. Act on behalf of the company is not a technical matter, but it has to satisfy the condition under S.142 (a) of the Act. The complainant here is a Company incorporated under the Companies Act and the complaint was filed by its power of attorney holder. Subsequently, the power of attorney holder delegated the power given to

him to another person and the resolution from the company was not produced in the trial Court. Now that sub delegation was challenged by the revision petitioner in this case. It is true that a power of the attorney holder can sign a complaint and file a complaint on behalf of the payee or holder in due course, but he has no power to delegate such power to another person without proper authorisation. This position was discussed by the larger Bench of the Supreme Court in **A.C. Narayanan v. State of Maharashtra** [2013 (4) KLT 21 (SC), wherein held the principle as follows:

"25. Similar substantial questions were raised in the appeal arising out of S.L.P (Crl.) No. 2724 of 2008, which stand answered as above. Apart from the above questions, one distinct query was raised as to whether a person authorized by a Company or Statute or Institution can delegate powers to their subordinate/others for filing a criminal complaint? The issue raised is in reference to validity of sub -delegation of functions of the power of attorney. We have already clarified to the extent that the attorney holder can sign and file a

complaint on behalf of the complainant -payee. However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub -delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub -delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

26.While holding that there is no serious conflict between the decisions in MMTC (supra) and Janki Vashdeo Bhojwani (supra), we clarify the position and answer the questions in the following manner:

(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) 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.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the

complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

7. The general law is that anyone can set the criminal law in motion by filing a complaint before a Magistrate entitled to take cognizance under Section 190 of the Code. If a Statute prescribes any special criteria for putting the criminal law in motion, no court can take cognizance of the offence by violating those special criteria. Section 190 of the Code does not indicate any qualification for the complainant. According to S.142 of the N.I. Act, no Court shall take cognizance of the offence under S.138, except upon a complaint in writing made by the payee or the holder in due course of the cheque. But when a special statute prescribes an offence and provides

special provision for taking cognizance of such offences under the Act, the complainant must satisfy the eligibility criterion prescribed by the statute for taking cognizance of the offence. Apex Court in Vishwa Mitter v. O.P. Poddar [1983 4 SCC 701] held that any one can set the criminal law in motion by filing a complaint before a Magistrate to take cognizance. 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 M.M.T.C. and Anr. vs. Medchl Chemicals and Pharma (P) Ltd. and Anr [2002 1 SCC 234], a Division Bench of the Apex Court has opined that "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".

8. In **Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd. and Ors.**, [2005 2 SCC 217] it was held that Order 3 Rules 1 and 2 CPC empowers the holder of power of attorney to 'act' on behalf of the principal. 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 is entitled to be cross -examined." In short filing complaint by the power of attorney is perfectly legal.

9. The challenge here is whether the power of attorney holder has any power to sub delegate the power to another person, without specific authorisation in the power of attorney. As per the terms of the general power of attorney, if the power to further delegate is mentioned in the general

power of attorney, then such delegation is valid. If the authority to delegate the function to the power of attorney is silent about sub delegation, then such sub delegation must be inconsistent with the terms of the power of attorney. In this case, if the authorisation was delegated by virtue of Exts.P1 and P2 by the Company, they can act upon the terms of the general power of attorney. The power of attorney holder can verify and depose before court to prove the averment in the complaint. If he has witnessed the transaction as an agent of the payee or holder in due course, and has direct knowledge about the transaction the complainant has to make specific assertion about it in the complaint. But the other hand if he has no knowledge about the transaction, he cannot be examined as a witness to prove the transaction.

10. According to Section 138 of the N.I. Act, where any cheque drawn by a person on an account maintained by

him with a bank for payment of any amount to another person from that account, for the discharge of any debt or liability, is returned by the bank, either because of the amount in that account is insufficient to honour the cheque or that it exceeds the amount arranged from that account, such person shall be deemed to have committed an offence under Section 138 of the Negotiable Instruments Act. This deemed provision is subject to the statutory condition that the cheque has to be presented within the statutory period in which it is drawn or within the period of its validity. Secondly, the payee or holder of the cheque has to make a demand for such amount by giving a notice in writing to the drawer of the cheque within 30 days and non-payment of due amount within 15 days after receipt of notice by the drawer of the cheque.

11. The evidence of PW1 shows that the cheque was dishonoured for the reason of funds insufficient and he demanded the amount by giving a notice in writing. Ext.P1 is the power of attorney given by appolo tyres to one Sreekumar who filed the complaint. Ext.P2 is the power of attorney executed by Sreekumar in favour of one Jose. But, these two persons were not examined as witnesses in this case. On the other hand, one Joseph was examined as PW1 and the Bank Manager was examined as PW2. The resolution of the Board of Directors and the authorisation issued by Sreekumar to Joseph were not produced in the trial Court and its validity was not considered in this case. Moreover, no documents were produced in the trial Court to show that Joseph and Jose J.P. are one and the same person and not examined the validity of the power

delegated by Sreekumar. The power of attorney holder can depose and verify on oath before Court in order to prove the content of the complaint. However, he has to prove the nature of delegation in the power of attorney.

12. Appellate Court has the power to take further evidence or direct it to be taken by Sessions Judge or a Magistrate. If the appellate Court is the high court it can direct to the Court of Sessions or to the Magistrate to take such evidence, if it thinks additional evidence is necessary for disposing the case, and the discretion has to exercise on juridical principle alone.

S.391 Cr.P.C. reads as follows:

"Appellate Court may take further evidence or direct it to be taken.- (1) in dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a

Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

The cheque was dishonoured for the reason of funds insufficient and the complainant demanded the money by giving a notice in writing. Ext.P6 is the unclaimed demand notice issued by the complainant. A perusal of above document shows that Ext.P6 notice was not opened in the trial court and its content was not challenged in the trial Court, but the appellate Court without giving any opportunity, opened the letter and received additional

evidence by accepting the content of the document and made observation in the appellate court judgment. It is true that making demand of the due amount is a mandatory requirement u/s.138 (b) of the N.I. Act. In that situation, the appellate court opened the demand notice issued under S.138(b) without giving opportunity to the accused and filled the lacuna in the prosecution case.

13. The object of taking additional evidence under Section 391 of the Code is to ensure that justice is done between the prosecution and the accused. Additional evidence cannot be permitted at the appellate stage as of right and appellate court has to exercise its discretion on sound judicial principle alone. It is not an arbitrary discretion, while giving opportunity to take additional evidence at the appellate stage, the Court has to record

its reason. On a perusal of the procedure, it is clear that an illegality was committed by the appellate Court while invoking Section 391 of Cr.P.C. Apex Court in Rajeswar Prasad Misra v. State of West Bengal [AIR 1968 SC 1887] held that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power has to be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must not, however, be received in such a way as to cause prejudice to the accused, as for example, it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the

prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. In this case, Ext.P6 notice issued by the complainant was returned as unclaimed, which was opened by the appellate Court and admitted its content in evidence without giving any opportunity to the revision petitioner, which caused prejudice to the accused.

14. In short, filing of a complaint through power of attorney for offence under Section 138 of N.I Act is perfectly valid and the power of attorney can depose and verify on oath before the Court in order to prove the contents of the complaint. If the power of attorney holder had witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions, he has to make specific

assertion in the complaint about his knowledge. If the power of attorney holder has no direct knowledge about the transactions, he cannot be examined as a witness to prove the transaction in a case. The courts below failed to verify the nature of delegation and sub delegation of power in Exts.P1, P2 power of attorney. The nature of sub delegation was not answered by the Courts below. Moreover, additional evidence has been admitted without giving opportunity to the revision petitioner. Hence, these infirmities warrant me to invoke the revisional jurisdiction in this case.

In the result, the conviction and sentence passed by the Judicial First Class Magistrate u/s.138 of the N.I. Act are set aside. The matter is remitted to the trial Court for fresh consideration. Both parties are at liberty to

adduce fresh evidence and the learned Judicial First Class Magistrate, Irinjalakuda is directed to dispose of the matter as per law at the earliest.

P.D. RAJAN, JUDGE.

acd

7. S.142 of the N.I. Act reads as follows:

"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 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 © 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.