

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.432 OF 2015

1. M/s. Jaimin Jewellery Exports Pvt.
Ltd. A company incorporated under the
Companies Act, 1956.

2. Mr. Gautam Mehta
Age 60 years adult Indian Inhabitant
permanently residing at 52, Marble
Arch, G. Deshmukh Marg,
Peddar Road, Mumbai-400 026

3. Jaimin G. Mehta
Age 30 years, adult Indian Inhabitant
Permanently residing at
52, Marble Arch, G. Deshmukh Marg,
Peddar Road, Mumbai-400 026

...Applicants

Versus

1. The State of Maharashtra
2.SBI Global Factors Ltd.,
A Company incorporated under The
Companies Act 1956
Having its registered office at
Metropolitan Building,
6th Floor, Bandra Kurla Complex,
Bandra (E), Mumbai 400 051.

...Respondents

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Mr. I.S. Thakur, with Mr. Sunil Kumar Rathod, Mr. Ravi S. Kotian
and Mr. C.S. Patil for the Applicants.
Mr. Yashpal Thakur for the Respondent No.2
Mr. J.H. Ramugade, APP for the Respondent No.1-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

**JUDGMENT RESERVED ON : 15th FEBRUARY, 2017.
JUDGMENT PRONOUNCED ON :14th MARCH, 2017.**

ORAL JUDGMENT :

By this revision application filed under Section 397 of the Code of Criminal Procedure, the Applicants herein have challenged the judgment and order dated 28th August, 2015 whereby the learned Sessions Judge dismissed the Criminal Appeal No.338 of 2012 and thus, confirmed conviction and sentence of the aforesaid Applicants under section 138 r/w. 141 of the Negotiable Instruments Act.

2. The Applicants are the original accused and shall be hereinafter referred to as 'the accused' whereas the Respondent No.2 herein is the complainant in C.C. No.821 of 2010 filed before the Metropolitan Magistrate, 12th Court, Bandra and shall be hereinafter referred to as the Complainant-company.

3. The Complainant-company was earlier known as Global Trade Finance Facility. Pursuant to the order dated 15th January, 2010 passed by this Court in Company Petition, the Global Trade Finance Facility was amalgamated with SBI Factors and Commercial Services Pvt. Ltd. As a consequence of the amalgamation, the name of the Company was changed to SBI Global Factors Ltd.

4. M/s. Jaimin Jewellery Exports Pvt. Ltd.(Accused No.1) was

earlier a partnership firm with accused Nos.2 and 3 as its partners. The said partnership firm was registered and incorporated under the Companies Act, 1956 as a private limited company on 20th March, 2008. The accused Nos.2 and 3 are the Directors and authorised signatories of the accused No.1-Company.

5. The case of the Complainant-company is that the accused No.1 had approached the Complainant-company for Trade Finance Facility. The Complainant-company, considered the request of the accused No.1 and sanctioned the Trade Finance Facility on 1st November, 2007. On 3rd November, 2007 the Complainant-company and M/s. Jaimin Jewellery Exports executed Global Accounts Receivable Agreement for Trade Finance Facility. The accused No.2 stood as a guarantor and issued a letter of guarantee dated 5th November, 2007 in favour of the Complainant-company. Since M/s. Jaimin Jewellery Exports, a partnership firm was registered and incorporated under the Companies Act, 1956 as a private limited Company, a fresh Global Accounts Receivable Agreement for Trade Finance Facility(ies) dated 26th November, 2008 was executed between the Complainant-company and the accused No.1 herein.

6. The Complainant-company stated that accused in discharge of their legally enforceable liability and debt towards repayment of above

referred Trade Finance Facility(ies) due and payable to the Complainant-company, issued five cheques. The details of which are as under :-

Sr. No.	Cheque No.	Cheque Date	Amount in Rupees
1	747001	31/10/2009	1,00,00,000/-
2	747002	31/10/2009	1,00,00,000/-
3	747003	31/10/2009	1,00,00,000/-
4	747004	31/10/2009	1,00,00,000/-
5	747005	31/10/2009	50,00,000/-

7. The said cheques were drawn on Canara Bank, Overseas Branch, Mumbai-400 021 as part payment in favour of the Complainant-company and were duly signed by accused No.2 on behalf of accused No.1-Company.

8. The Complainant-company presented the cheques at Serial No.1 for encashment on 15th March, 2010. The cheque at Serial Nos. 2 and 3 were presented on 17th March, 2010 and 19th March, 2010, respectively whereas the cheques at Serial Nos.4 and 5 were presented for encashment on 20th March, 2010. All the said cheques were dishonoured for insufficient funds.

9. The Complainant-company by statutory notice dated 13th April, 2010 called upon the accused to effect the payment within 15 days from the receipt of the notice. The said notice was duly served upon the accused. By reply dated 4th May, 2010, the accused denied their liability and claimed that

the cheques were issued as security. The Complainant-company vide letter dated 20th May, 2010 denied the contents of the said reply. The accused, having failed and neglected to pay the cheque amount, the Complainant-company filed a complaint under section 138 r/w. 141 of the Negotiable Instruments Act (for short 'NI Act'). It was registered as C.C. No.820/SS/2010.

10. The plea of the accused was recorded. The accused pleaded not guilty and claimed to be tried. The Complainant-company in support of its case examined CW-1 Shri Vimukt Nayak, Senior Officer, Legal who was a authorised representative of the Complainant-Company. The Complainant-company also examined CW2 Mr. Mahesh Malunjkar, Senior Officer, Legal, and CW-3 Mr. Santosh Sawant, Senior Manager, Client Relationship and IT. The statements of the accused were recorded under Section 313 of the Code of Criminal Procedure. The defence of the accused as can be gathered from the reply to the statutory notice as well as the tenor of the cross examination is that the said cheques were not issued towards legally enforceable debt, but the blank signed cheques were issued as collateral security of Trade Finance Facility(ies).

11. The learned Magistrate after considering the evidence adduced by the Complainant-company as well as the defence set up by the accused

held that the evidence adduced by the Complainant-company proves that Jaimin Jewellery Exports Pvt. Ltd., which was initially a partnership firm had availed Trade Finance Facility from the complainant Company. The learned Magistrate further held that the subject cheques were undisputedly signed by the accused No.2. The learned Judge further held that the accused have failed to prove the defence set up by them and have therefore, failed to rebut the presumption under Section 118(a) and Section 139 of the NI Act.

12. The learned Magistrate therefore, held the accused guilty of the said offences and sentenced the accused Nos.2 and 3 to suffer simple imprisonment for a period of one year and further directed the accused Nos. 1 to 3 to pay compensation to the tune of Rs.4,56,00,000/- to the Complainant-company within a period of three months from the date of the judgment.

13. The said judgment was challenged in Criminal Appeal No.338 of 2012, which was dismissed by the learned Sessions Judge by judgment and order dated 20th August, 2014. The accused have filed this revision application challenging the legality and correctness of the said orders.

14. Heard the learned counsel for the accused, the learned APP for the Respondent No.1-State and the learned counsel for the Complainant-

company.

15. Mr. I.S. Thakur, the learned counsel for the accused has submitted that the complaint under Section 138 of the NI Act is filed by the Power of Attorney. He has submitted that there are no averments in the complaint that the Power of Attorney had knowledge of the transaction as he had joined the Complainant-company at a much later stage. He contends that the evidence of CW1 reveals that he had no knowledge of the transaction. Relying upon the decisions of the Apex Court in *A.C. Narayanan & Anr. Vs. State of Maharashtra & Ors. 2014 AIR 630*, and *A.C. Narayanan & Anr. Vs. State of Maharashtra & Ors.(2015) AIR SC 1198* he submits that CW1 Vimukt Nayak, the Power of Attorney was not competent to file a complaint and depose on behalf of the Complainant-company.

16. The learned counsel for the accused has submitted that the cheques were issued by the partners of the erstwhile partnership firm and not by the directors of the accused No.1. He submits that the Trial Court has erred in assuming that the accused No.1-company was a drawer of the said cheques. He has submitted that the accused No.1-Company was not a drawer of the cheque and was not liable to pay the amount quantified in the cheques. Hence, the accused Nos.2 and 3, who are the Directors of the

accused No.1-company cannot be held vicariously liable for the alleged offence.

17. Mr. I.S. Thakur, the learned counsel for the accused has further submitted that the fact that the cheques were issued by a partner indicates that the cheques were issued as security and were not intended to be presented for encashment. He has submitted that the Complainant-company herein had filed Summary Suit in respect of the same cause of action and that the amount claimed in the said suit is less than the cheque amount. He has submitted that except the statement of account at Exh. 'FF' the Complainant-company had not produced any other documents to show that the accused were liable to pay the cheque amount. He has submitted that the provisions of Section 65 B of the Indian Evidence Act are not complied with and statement at Exh. 'FF' itself is not admissible in evidence. He has further stated that since the cheque is more than the actual liability the provisions of Section 138 of the NI Act are not applicable.

18. Per contra Mr. Yashpal Thakur, the learned counsel for the Complainant-company has submitted that the accused herein have been convicted by the Trial Court and the conviction and sentence has been upheld by the Appellate Court. He contends that in exercise of the revisional powers the Court cannot reappreciate the evidence and cannot interfere

with the findings unless the same are perverse and illegal.

19. The learned counsel for the Complainant-company has submitted that the decision of the Apex Court in A.C. Narayanan is not applicable to the facts of the present case as the issue involved in the said judgment was with regard to authorisation given on behalf of individual person to appear and depose before the Court. Whereas in the present case the authorisation is given by the Complainant-company, which is a juristic person. He has stated that the transaction between the Complainant-company and the accused was based on documentary evidence. He has further submitted that CW1- Vimukt Nayak who was duly authorised by the Complainant-company had derived the knowledge on the basis of the various documents which were executed by the accused and the Complainant-company. He has submitted that the CW1 Vimukt Nayak possessed requisite knowledge with regard to the said transaction and hence he was competent to file the complaint and depose on behalf of the Complainant-company.

20. Shri Yashpal Thakur, the learned counsel for the Complainant-company has submitted that the complaint was filed in the year 2010 and the judgment was delivered by the Trial Court on 13.3.2012. He submits that the law laid down by the Apex Court in A.C. Narayan (supra) by

judgment delivered on 13.9.2013 was not in force as on the date of the impugned judgment dated 13.3.2012.

21. The learned counsel for the Complainant-company therefore contends that the principles laid down by the Apex Court in A.C. Narayanan (supra) cannot be made applicable retrospectively, when the the judgment does not state either expressly or by implication that the same would be applicable retrospectively. He submits that the said judgment, which affects substantive rights of the parties, would apply prospectively.

22. He has submitted that in *Dashrath Rupsingh Rathod Vs State of Maharashtra (2014) 9 SCC 129*, the Apex Court while dealing with the issue of territorial jurisdiction with regard to filing of the complaint under Section 138 of the NI Act had expressly observed that the judgment would apply retrospectively but would not affect the cases where recording of evidence had commenced as envisaged under section 145 (2) of the NI Act. He submits that since the judgment in A.C. Narayanan (supra) is silent about prospective and retrospective application of law, the judgment would apply prospectively.

23. The learned counsel Shri Yashpal Thakur has further submitted that in *Ms Mandavi Cooperative Bank Ltd. Vs. Nimesh B. Thakur AIR*

2010 SC 1402 the Apex Court, whilst considering whether the newly inserted provisions under sections 143 to 147 would apply prospectively or retrospectively held that these provisions are not substantive but are procedural in nature and hence, would apply to all pending cases. He has further submitted that in ***Smt. Dayawati and Anr. Vs. Indrajit and Anr. 1963 SC 143*** the Apex Court has observed that a Court of Appeal cannot take into account a new law brought into existence after the judgment appealed from has been rendered because the rights of the litigants in an appeal are determined under the law in force at the date of original proceedings. It has been held that a new law ought to be prospective and not retrospective in its operation. In the light of the ratio laid down in the aforesaid decision, the learned counsel Shri Yashpal Thakur submits that the decision in the case of A.C. Narayanan (supra) which affects substantive rights, cannot be made applicable retrospectively.

24. Mr. Yashpal Thakur has further submitted that the law laid down by the Apex Court in A.C. Narayanan (supra) has been considered by this Court in ***Girish Jaggal v/s. Mallikarjin Shippings Pvt. Ltd. 2015 ALL M.R. (CRI) 68***. It has been held in Girish Jaggal (supra) that the complaint cannot be dismissed merely because there are no averment in the complaint to the effect that the witness has personal knowledge of the transaction. The learned counsel for the Complainant-company has submitted that the

evidence of CW1-Vimukt Nayak that he has derived knowledge of the transaction on the basis of the documents has gone unchallenged. He therefore, urges that neither the complaint can be dismissed nor the evidence of CW1-Vimukt Nayak, who is an authorised representative of the Complainant-company can be discarded for want of averments in the complaint.

25. The learned counsel for the Complainant-company has further submitted that the accused have not disputed having availed Trade Finance Facilities. He has submitted that the evidence adduced by the Complainant-company has gone unchallenged. He has drawn my attention to the various documents including the judgment in Summary Suit and has submitted that the said documents clearly establish the liability of the accused. He has submitted that the accused have admitted having issued the subject cheques. Relying upon the decision in ***Rangappa Vs. Sri Mohna Manu/SC/0376/2010*** he submits that the onus was on the accused to rebut the presumption under Section 139 of the NI Act. He submits that the only defence raised by the accused was that the cheques were issued as a security. He contends that the fact that the cheques were issued as a security would not absolve the accuse of the liability under Section 138 of NI Act. He has relied upon the judgment of this Court in ***Sai Auto Agencies Vs/. Shaikh Yusuf Shaikh Umar Manu/MH/0126/2010***, wherein it is held

that the cheque given as a security, if dishonoured, can be the subject matter of a prosecution under Section 138 of the NI Act.

26. The learned counsel for the Complainant-company has further submitted that even though the accused have not adduced any evidence to show that the said cheques were issued towards security or that the said cheques were never intended to be presented for encashment. The evidence adduced by the Complainant-company coupled with the fact that the accused have not rebutted the presumption is sufficient to hold that the cheques were issued towards discharge of existing liability.

27. The learned counsel for the Complainant-company has submitted that even otherwise filling up of the amount in a blank cheque is permissible under Section 20 of the NI Act and filling up of blank cheque does not amount to alteration under Section 87 of the NI Act. He has placed reliance on the decision of the Court in Purshottam MAniklal Gandhi Vs. MAnohar K. Deshmukh 2007 (4) Bom CR 404. He has next contended that the Complainant -company had continued the business of the partnership firm and hence would not be absolved of the liability of the partnership firm. He has relied upon the decision of Allahabad High Court Ram Chandra Agarwal Vs. State of UP 2014 ALL MR (CRI) Journal 312. He has submitted that the Complainant-company has established all the essential ingredients

of the offence punishable under Section 138 of the NI Act. The order of the Trial Court as well as the Appellate Court is neither perverse nor illegal and hence, the same cannot be interfered with.

28. I have perused the records and considered the submissions advanced by the learned counsel for the accused and the learned counsel for the Complainant-company. It is not in dispute that the Complainant-company was earlier known as Global Trade Finance Limited. By order dated 15th January, 2010 at Exhibit 'A' the same has been amalgamated with the SBI Factors and Commercial Services Pvt. Ltd. It is also not in dispute that the accused No.1, was earlier a partnership firm and that the accused Nos.2 and 3 were its partners. On 20th March, 2008, the said partnership firm had been incorporated under Companies Act as a private limited company with accused Nos.2 and 3 as its Directors.

29. The accused were prosecuted for offences punishable under Section 138 read with 141 of the Negotiable Instruments Act for dishonour of five subject cheques, which according to the Complainant-company were issued towards repayment of Trade Finance Facilities availed by the accused. The said complaint was filed by Mr. Vimukt Nayak, the Power of Attorney of the Complainant-company based on the resolution dated 26.3.2010 (Exh-C) passed by the Board of Directors of the Complainant-company. Since the

accused have challenged the competency of CW1 to file the complaint and to depose as a witness of the complainant for want of assertion that he had knowledge of the transaction, it would be necessary to refer to the judgment of three Judge Bench of the Apex Court in A.C. Narayanan 2014 AIR (SC) 630.

30. The Division Bench of the Apex Court while considering Appeal No.73 of 2007 with regard to interpretation of Section 142(a) of N.I.Act had observed that in view of difference of opinion among various High Courts as well as the decision in MMTC Ltd. & Anr vs. Medchl Chemicals and Pharma (P) Ltd. & Anr. (2002) 1 SCC 234 and Janki Vasudev Bhojwani & Anr. vs. Indusind Bank Ltd. (2005) 2 SCC 217, the matter should be considered by a larger Bench in order to render an authoritative pronouncement.

31. The three Judge Bench of the Apex Court in A.C.Narayanan tagged Cri. Appeal No.2724 of 2008 alongwith Criminal appeal No.73 of 2007 and in terms of the reference order formulated the following questions :

15) In terms of the reference order, the following questions have to be decided by this Bench:

*(i) Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/
Whether the eligibility criteria prescribed by Section 142(a) of NI Act would stand satisfied if the complaint*

petition itself is filed in the name of the payee or the holder in due course of the cheque?

(ii) Whether a Power of Attorney holder can be verified on oath under Section 200 of the Code?

(iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint?

(iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge?

(v) Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002?"

32. While deciding whether there was any conflict between the decision in *M.M.T.C.Ltd. and Anr. Vs. Medchl Chemicals and Pharma (P) Ltd. and Anr. (2002) 1 SCC 234* and *Janki Vashdeo Bhojwani and Anr. vs Indusind Bank Ltd. and Ors., (2005) 2 SCC 217* the Apex Court after considering the factual details and ultimate dictum laid down in both the decisions held as under:

"19. As noticed hereinabove, though *Janki Vashdeo Bhojwani (supra)*, relates to powers of Power of Attorney holder under CPC but it was concluded therein that a plaint by a Power of Attorney holder on behalf of the original plaintiff is maintainable provided he has personal knowledge of the transaction in question. In a way, it is an exception to a well settled position that criminal law can be put in motion by anyone [*vide Vishwa Mitter (supra)*] and under the Statute, one stranger to transaction in question, namely, legal heir etc., can also carry forward the pending criminal complaint or initiate the criminal action if the original complainant dies [*Vide Ashwin Nanubhai Vyas vs. State of*

Maharashtra (1967 1 SCR 807. Keeping in mind various situations like inability as a result of sickness, old age or death or staying abroad of the payee or holder in due course to appear and depose before the Court in order to prove the complaint, it is permissible for the Power of Attorney holder or for the legal representative(s) to file a complaint and/or continue with the pending criminal complaint for and on behalf of payee or holder in due course. However, it is expected that such power of attorney holder or legal representative(s) should have knowledge about the transaction in question so as to able to bring on record the truth of the grievance/offence, otherwise, no criminal justice could be achieved in case payee or holder in due course, is unable to sign, appear or depose as complainant due to above quoted reasons. Keeping these aspects in mind, in MMTC (supra), this Court had taken the view that if complaint is filed for and on behalf of payee or holder in due course, that is good enough compliance with Section 142 of N.I. Act".

.....

23) 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 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. On this count, the fourth question becomes infructuous.

...

24) In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that 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.

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."

33. It is sought to be contended that the reference in A.C. Narayanan (supra) was made in Criminal Appeal No.73 of 2007, which was arising from a complaint filed by an individual person. Seeking to make distinction between complaints filed by juristic and non-juristic person, the learned counsel for the Complainant-company has sought to contend that the ratio laid down by the Apex court in A.C Narayanan (supra) is not applicable to the complaints filed by a juristic person.

34. A plain reading of the judgment in A.C.Naraynan (supra) reveals that though the reference was in Criminal Appeal No.73 of 2007, the Apex Court had tagged and heard Criminal appeal No.2724 of 2008 along

with criminal appeal no.73 of 2007. The Criminal Appeal No.2724 of 2008 relates to the complaint under section 138 of the NI Act filed by the Power of Attorney on behalf of the Company. The decisions in A.C. Narayanan (supra) 2014 AIR SC 630 and 2015 AIR SC 1198 reveal that both these appeals were heard together as they involved common question of law. Hence, the distinction sought to be drawn by the learned counsel Shri Yashpal Thakur is factually incorrect.

35. It is pertinent to note that in the aforesaid decision the Apex Court has interpreted Section 142 (a) of the NI Act, which 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. This section prescribes the procedure for taking cognizance of offences punishable under Section 138 of the NI Act. This section which is an exception to the general rule that anyone can set the criminal law in motion, mandates that no court shall take cognizance of an offence under Section 138 of NI Act unless the complaint is made in writing by a payee or by a holder in due course, as the case may be.

36. It is thus, evident that the payee / holder in due course of the cheque is alone competent to file a complaint under section 138 of the N.I.Act. In case the payee is a company, the complaint should necessarily be

filed in the name of the company. However, company being a juristic person it can act only through a representative authorised by the Board of Directors either by a resolution or by executing a power of attorney.

37. In A.C. Narayanan (supra), the Apex Court after considering the scope of Section 138, 142 and 145 of N.I.Act, has held that the payee or the holder in due course can authorise his constituted attorney to make a complaint under Section 138 of the Act and depose on oath before the Court provided constituted attorney has witnessed the transaction as an agent of the payee/holder in due course or possesses due knowledge of the transaction. It is to be noted that the Act does not prescribe a separate procedure for the complaints filed by juristic and non-juristic person. Furthermore, the Apex Court has not made any such distinction in A.C. Naraynan (supra). Hence, it is not possible to accept the contention of the learned counsel for the Complainant-company that the principles enunciated in the said decision are restricted only to the complaints filed by an individual person and not by a juristic person.

38. At this stage, it would also be advantageous to refer to the provisions under Sections 118(a) and 139 of the NI Act. Section 118(a) of the NI Act raises a presumption that until contrary is constituted attorney of the proved; every negotiable instrument was made or drawn for

consideration, whereas Section 139 of the NI Act raises a presumption that unless the contrary is proved, the holder of the cheque received the cheque for the discharge of whole or part of any debt or liability. The presumptions under Sections 118(a) and 139 of the NI Act are rebuttable in nature. The presumption under these provisions need not be rebutted only by adducing direct evidence but can be rebutted on the basis of the facts elicited in the cross examination. Suffice it to say that the power of attorney will not be competent to depose in respect of a transaction of which he has no knowledge. As a result thereof, the accused will be precluded from effectively cross examining the power of attorney and eliciting the required material to dislodge the statutory presumption. It is therefore imperative that the power of attorney authorised by an individual or juristic person has knowledge of the transaction. In the light of above, the contention of the learned counsel Shri Yashpal Thakur that the power of attorney appointed by a juristic person need not have personal knowledge of the transaction needs to be rejected.

39. In my considered view, the principles laid down in A.C. Narayanan that the power of attorney who files complaint for the offence punishable under section 138 of NI Act and deposes on behalf of the payee must essentially have personal knowledge of the transaction are also applicable to complaints filed by a juristic person.

40. It is to be noted that there were divergent views between various High Courts on the question whether the power of attorney could depose on behalf of the principal. In *Dr. Pradeep Mohanbhai Vs. Mingel Karlos Dais* 2000 volume 102(1) Bombay L.R. 908 this High Court has held that a power of attorney can file a complaint under section 138 of the NI Act but cannot depose on behalf of the complainant. He can only appear as a witness. Similar view was taken by the Rajasthan High Court in *Shambhudatta Shastri Vs. State of Rajasthan* 1986 (2) WLN 713 and *Ramprasad Vs. Harinarayan & ORs* AIR 1998 Rajasthan 185. Whereas a contrary view was taken by this High Court in *Humberto Luis & Anr. Vs. Floriano Luis Armando Luis and Anr.* 2000 (2) BOM.C.R. 754. The Apex Court in *Janki Bhojwani vs. Indusind Bank Ltd.* (2005) 2 SCC 217 has held that the view taken by the Rajasthan High Court in the case of *Shamhudatta Shastri* followed and reiterated in the case of *Ramprasad* is the correct view. The Apex Court has held that the view taken in the case of *Floraino Luis* cannot be said to have laid down a correct law and accordingly overruled the same. Thus, the controversy over the issue whether the power of attorney could file a complaint and whether he could depose on behalf of the complainant was set to rest by the Apex Court in *Janki Bhojwani*(supra). This decision clearly sets out that the power of attorney is entitled to file a complaint and depose provided he has personal knowledge of the

transaction in question.

41. In A.C. Narayanan, (supra) the Apex Court while interpreting the provisions of section 142 (a) and 145 which are procedural in nature and were already existing on the statute book as on the date of filing of the complaint, reiterated that the power of attorney is competent to file a complaint under section 138 of the NI Act and to depose before the Court provided he has knowledge of the transaction in question. The Apex Court has neither laid down a new proposition of law on the subject nor upset the settled position of law. The said decision also does not affect any vested or substantial right of the parties. Hence, there is no merit in the contention of the learned counsel Shri Yashpal Thakur that the principles enunciated in A.C. Narayanan (supra) operate prospectively and not retrospectively.

42. In Girish Jaggal (supra) the accused had sought quashing of proceedings under Section 138 of the NI Act on the ground that the complaint did not contain specific assertion that the power of attorney holder had the knowledge of the transaction. The Single Judge of this Court held that the defect if any, can always be rectified even at a subsequent stage and therefore the complaint cannot be quashed on the sole ground that the complaint does not contain a specific assertion as to the knowledge of transaction. In the present case, the Complainant-company had not tried to

rectify the defect and the case has well passed the stage of rectification. Hence, the said Judgment is not applicable to the facts of the case.

43. Now coming to the merits of the present case, the complaint under section 138 of the NI Act was filed by CW1 Vimukt Nayak, who was authorised by the Board of Directors of the Complainant-company. The said complaint does not contain any assertion as to the knowledge of CW1 Vimukt Nayak in respect of the transaction in question. It is further to be noted that CW1 Vimukt Nayak had given his evidence on affidavit in terms of Section 145 of the NI Act. In paragraph 13 of the said affidavit the power of attorney-CW1 Vimukt Nayak has asserted that the contents of the complaint are true and correct, without making a specific assertion as to his knowledge. Nevertheless, the verification clause of the affidavit he has stated as under:

"VERIFICATION

I, Vimukt G. Nayak, aged 31 years, working as Sr. Legal Officer with the Complainant Company, SBI Global Factors Ltd. (erstwhile known as Global Trade Finance Ltd.,) the Complainant herein do solemnly affirm and say that whatever is stated in the aforementioned paragraphs is true to my knowledge and belief and I believe the same to be true and correct."

44. At this stage it would be relevant to refer to paragraphs 3 to 5 of the Chapter VII of the Criminal Manual, which read as under :

"3. (1) Every person making an affidavit shall state his full name, father's name, surname, age, profession or trade and place of

residence and shall give such other particulars as will make it possible to identify him clearly.

(2) The affidavit shall be signed by him in his own hand or he shall make his finger impression thereon.

4. Unless it is otherwise provided, an affidavit may be made by any person having knowledge of the facts deposed to.

5.(1) Every affidavit should clearly specify what portion of the statement is made on the declarant's knowledge and what portion of the statement is made on his information or belief.

(2) When a particular portion is not within the declarant's own knowledge but it is stated from information obtained from others, the declarant must use the expression "I am informed" and if it is made on belief should add "I verily believe it to be true." He must also state the source or ground of the information or belief, and give the name and address of, and sufficiently described for the purpose of identification, the person or persons from whom he had received such information.

(3) When the statement rests on facts disclosed in documents or copies of documents procured from any Court or other person, the declarant shall state the source from which they were procured and his information, or belief, as to the truth of the facts disclosed in such documents."

45. In **A.K.K. Nambiyar Vs Union of India and Anr. AIR 1970 SC**

652 the Apex Court has observed that :

"The reason for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of, rival parties. Allegations may be true to knowledge or allegations may be true to informations received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the Deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. "

46. These principles have been followed by the Bombay High Court

in Rajendra Gandhi Vs State of Maharashtra 1989 (1) Bom CR 337.

47. It is thus clear that filing of an affidavit is not an empty formality. The mandate is that the affidavit should clearly state what portion of the statement is made on declarants' knowledge and what portion of statement is made on his information and belief. When a particular portion is not within the declarant's own knowledge but is based on information obtained from others or is based on documents, the declarant should disclose the source of information or belief.

48. In the instant case, the verification clause of the affidavit filed by CW1-Vimukt Nayak indicates that all the facts stated in the affidavit were true to his knowledge. It is however to be noted that CW1-Vimukt Nayak has stated in his cross examination that he had not witnessed the transaction. He has admitted that his knowledge of the transaction was based on the documents, which he had seen for the first time on 13.4.2010 i.e. at the time of issuance of the statutory notice. The verification clause does not disclose that the knowledge of this witness was based on records. He had also not disclosed the source of information as required in paragraph 5(3) of Chapter 7 of the Criminal Manual. The affidavit of CW3 also suffers from similar defects. The affidavit of CW2 is also defective as it does not contain any verification clause and the affidavit does not disclose whether

the contents of his affidavit are true to his knowledge or based on records.

49. Be that as it may, the admissions as elicited in the cross examination of CW1 reveal that he did not have personal knowledge of the transaction in question. He was therefore, not competent to depose as a witness. It may be mentioned here that CW2 has also deposed on behalf of the complainant-company without there being any authorisation in his favour. He has not only produced the statement of account at Exh.'FF' but has reiterated the contents of the complaint and has tried to plug in the loopholes by producing some of the documents, which were not produced by CW1. This witness also did not have the knowledge of transaction and was not competent to depose on behalf of the Complainant-company.

50. Now coming to the facts of the case, the Complainant-company has specifically alleged that the subject cheques dated 31st October, 2009 were issued by the accused No.2 as a Director of accused No.1 company towards repayment of trade finance facility. The evidence of CW1 Vimukt Nayak and CW2 Mahesh Malunjkar, Senior Officer, Legal reveals that M/s. Jaimin Jewellery Exports, a partnership firm, had approached the Complainant-company for Trade Finance Facilities. The Complainant-company had considered the request of M/s. Jaimin Jewellery Exports and sanctioned Trade Finance Facilities vide sanction letter dated 1st November,

2007 (Exhibit 'D'). The terms and conditions set out in the said trade finance facility are set out in the said sanction letter at Exhibit 'D'. Thereafter Global Account Receivable Management agreement for Trade Finance Facilities (Exhibit-'F') dated 3rd November, 2007 was entered into between the complainant-company Global Trade Finance Facility Ltd. and M/s. Jaimin Jewellery Exports. The accused No.2 issued a letter of guarantee dated 5th November, 2007 at Exhibit-'H' and thereby he unconditionally guaranteed as primary obliger to pay to the Complainant-company the outstanding/unpaid amount under the Trade Finance Facilities together with all interest due therein, cost charges and other expenses.

51. The evidence of these two witnesses vis-à-vis the certificate of incorporation (Exh.'J') reveals that M/s. Jaimin Jewellery Exports, which was a partnership firm, was incorporated as a Private Limited Company on 28th March, 2008 and the said Company continued carrying on the business of the partnership firm. The accused Nos.2 and 3 who were earlier the partners of M/s. Jaimin Jewellery Exports were now the Directors of the accused No.1-Company. The Complainant-company and accused No.1-M/s. Jaimin Jewellery Exports Pvt. Ltd., herein had entered into and executed Global Account Receivable Management Agreement dated 26th November, 2008 at Exhibit 'G'. The Memorandum of Association and Articles of Association dated 11th February, 2008 and 18th February, 2008 respectively

are at Exhibit 'B'.

52. The Directors of the accused No.1-company had resolved that the accused No.1-company would avail Trade Finance Facilities sanctioned by the Complainant-company upto credit maximum funding limit to INR 4,24,00,000/- vide letter dated 19th November, 2008. The said resolution is at Exhibit-'CC'. The accused No.3, the Director of the accused No.1-company issued a letter of guarantee at Exhibit- 'T' in favour of the Complainant-company giving an unconditional guarantee as a primary obliger (and not merely as surety) to pay the outstanding/unpaid amount under the Trade Finance Facilities together with all interest due therein, cost charges and other expenses.

53. CW1-Vimukt Nayak had deposed that the accused No.2 had issued the subject cheques at Exh.'K', 'L', 'M', 'N' and 'O' on behalf of the accused No.1 company towards repayment of the dues of Trade Finance Facilities. CW1-Vimukt Nayak has deposed that the accused had forwarded the subject cheques along with a covering letter. He has admitted not having produced the said covering letter on record. CW1-Vimukt Nayak has also admitted in the cross-examination that the accused No.1 company was required to produce invoices in respect of the goods supplied to their buyers. He has admitted that based on such invoices the Complainant Company was

providing funds under trade finance facility to the accused Company. He has denied the suggestion that the invoices, request letter, and other documents pertaining to the transaction, including statement of account of the complainant company and the ledger account of the accused No.1 for the relevant period were deliberately suppressed since there were no outstanding dues payables by the accused No.1 -company.

54. CW2 Mahesh Malunekar, the senior officer (Legal) of the Complainant-company has deposed that the Complainant-company has maintained the books of account in respect of the trade finance facility in their ordinary and usual course of business. He has produced printout of electronic record signed by Kailash Varodia, Senior Manager (Client Relationship) and Dattaram Patarpenkar (Chief Manager Client relationship of the Complainant-company). The said statement of account is at Exh-'FF'. He has denied the suggestion that the Complainant-company had obtained blank signed cheques at the time of execution of the trade finance agreement. He has denied that the employees of the said company had filled in the date and the amount of the said subject cheques and that the Company has misused the said cheques.

55. CW3- Santosh Sawant, Senior Manager-Client Relationship and I.T has deposed that the accused had availed trade finance facility from the

Complainant company. He has stated that the Complainant-company maintains details of the transaction. He has stated that the statement of account of the accused No.1 for the period from 1.4.2005 to 28.2.2011 and 1.3.2011 to 16.3.2011 shows that an amount of Rs.4,88,18,080.69 is due and payable to the Complainant-company. He has stated that the statement of account at Exh.'FF' is the printout taken from the computer maintained by the Complainant-company. He has stated that the staff of the Complainant-company has lawful control over the use of the computer and that the details of the transaction of the accused with the Complainant-company were regularly fed in the computer during the ordinary course of the said activities. He has stated that throughout the material part of the aforesaid period, the computer was operating properly and that the printouts of the statement of account at Exh. 'FF' contained true and correct information fed in the computer. He has further deposed that the company used to maintain books of accounts in respect of trade finance facilities granted to the accused. He has further stated that certified true copy of the statement of account was signed by Kailash Varodia and Dattaram Patarpengar. He has produced the certificate purported to be under sub section 4 of section 65 B of the Indian Evidence Act and has stated that contents of the said certificate are true and correct.

56. The case of the Complainant-company, as emerged from the

complaint and the evidence of CW1 and CW2, was that the accused no.2 had issued the subject cheques towards payment of outstanding dues in respect of trade finance facility. Whereas the accused had raised a specific defence that the Complainant-company had misused the blank signed cheques, which were obtained as security at the time of execution of Trade Finance Agreement. Since the accused had admitted having issued the subject cheques, the statutory presumption as contemplated under section 118 (a) and 139 of the Act was in favour of the Complainant-company and the onus was on the accused to rebut the initial presumption. Needless to state that the accused is not required to prove his defence beyond reasonable doubt as is expected of the Complainant but is expected to discharge the burden on preponderance of probability. As stated earlier, the accused in discharging the burden is not obliged to examine himself. He can discharge the burden on the basis of the material on record, or by eliciting such material in the cross examination as to create doubt about existence of legally enforceable debt or liability.

57. In this regard, it is pertinent to note that CW1-Vimukt Nayak has admitted in his cross-examination that he has not witnessed the transaction. He has also admitted that he is not aware as to when and to whom the said cheques were handed over. Similarly, the evidence of CW2 also does not indicate that he had knowledge of the transaction. In such circumstances,

the accused were precluded from cross-examining these witnesses and eliciting material to rebut the statutory presumption under section 118(a) and 139 of the NI Act.

58. Be that as it may, a perusal of the subject cheques reveals that the subject cheques dated 31st October, 2009 were issued under the signature of accused No.2 as a partner of M/s. Jaimin Jewellery Exports. It is pertinent to note that the said partnership firm M/s. Jaimin Jewellery Exports was already incorporated as a company on 20th March, 2008. Thus, as on 31st October 2009 i.e. the date appearing on the face of the subject cheques, the Partnership firm was not in existence and the accused no.2 was no longer a partner but was a director of the said company. The fact that the cheques were signed by the accused No.2 as a partner of M/s. Jaimin Jewellery Exports gives rise to an inference that the said cheques were issued on behalf of the partnership firm prior to 20th March 2008. This fact coupled with non-production of covering letter negates the case of the complainant that the cheques were issued by the accused no.2 on behalf of the Company on the date mentioned on the cheques and thus probabalises the defence of issuance of signed blank cheques as security.

59. Both the Courts have rendered a finding that the Partnership firm was incorporated as a Company without affecting their rights and

liabilities under the agreement. It was therefore held that the liability of the partnership firm or the accused No.1-Company does not cease due to the change in its constitution. Relying upon the provisions of sections 20 and 87 of the NI Act the learned Sessions Judge has held that the accused cannot be absolved of the liability of the section 138 of the NI Act merely because they had delivered signed blank cheques to the Complainant-company or because the Complainant-company had filled in the contents of the cheque. The learned Judge has held that under section 20 of the NI Act it is permissible for the holder of the cheque to fill in the date and specify the amount and such changes do not amount to alteration within the meaning of section 87 of the NI Act.

60. It is to be noted that section 20 of the NI Act permits the payee to filling the amount as well as the date in blank signed cheques and thus complete the inchoate instrument delivered to him. Such filling up of the date and the amount does not constitute alternation within the meaning of section 87 of the NI Act. There is absolutely no dispute about this proposition. It is also not in dispute that a mere statement that the cheque was issued towards security does not absolve liability under section 138 N.I.Act. The question in the present case is not about the applicability of section 20 of NI Act or the liability of the partnership firm after the incorporation of the Company or the liability of the Accused No.1 -Company

in respect of the cheque issued by the partnership firm as security. The question is about the genuineness of the case put forth by the Complainant-company. As stated earlier, in the instant case, the Complainant-company had come with a specific case that the accused No.2 had issued the subject cheques on behalf of the Complainant-company towards payment of outstanding dues. Whereas the accused had questioned the genuineness of the claim and raised a probable defence that the Complainant-company had filled in the amount and the date in the blank signed cheques which were given as security. Though the Complainant-company had specifically denied the defence raised by the accused, a perusal of the subject cheques reveals that the same were issued by the accused no.2 not as a director of the Company but as a partner of the Partnership firm. This fact not only negates the case of the Complainant company but leads to an inference that the said cheques were issued when the partnership firm was in existence and thus probabalises the defence that the same were given as security. The accused having proved their defence by preponderance of probability, the onus was on the Complainant-company to prove that the amount quantified in the cheque was the existing and subsisting liability.

61. The complaint as well as the evidence of CW1 and CW2 does not indicate that before quantifying the amount due, the Complainant-company had called upon the accused to pay the said specified dues. There

are no documents or any correspondence between the Complainant-company and the accused in respect of the dues which were payable. Cw1 has also admitted in the cross-examination that the funds under the trade finance scheme were released on the basis of the invoices submitted by the accused. The Complainant-company has not produced the invoices based on which the funds were released. The Complainant-company had not furnished to the accused the details of the amount released as per the invoices or the amount due as per the entries made in the statement of account. The Complainant-company has also not produced ledger account for the relevant period.

62. The learned Judge has held that though the accused had disputed the liability, they had not applied under section 91 of Cr.PC. for seeking production of invoices and other documents. The learned Judge has also held that the accused No.2 did not examine himself to rebut the presumption. Suffice it to say that the learned judge has failed to consider the well-settled principle that the accused has a right to remain silent. Furthermore, the accused need not examine himself for discharging the burden of proof placed upon him under a statute. He can discharge his burden by preponderance of probabilities based on the material already on record or brought on record through cross-examination. This is the dictum laid down by the Apex Court in Rangappa (supra). In such circumstances,

the learned judge has totally erred in drawing an adverse inference and discarding or disbelieving the defense of the accused merely on the ground that the accused had not stepped into the witness box or had not sought production of documents.

63. The learned Counsel for the Complainant Company has produced a copy of the Judgment dated 16.11.2011 passed by this Court in Summary Suit No. 1730 of 2010. He has submitted that the said judgment amply proves the liability of the accused and fortifies the contention of the complainant company that the cheques were issued towards payment of existing debt and/or liability. It may be mentioned that though the said ex-parte judgment dated 16.11.2011 was delivered during the pendency of the criminal case, the complainant company had neither produced the said judgment before the trial court nor made any reference to the said suit. The complainant company had totally suppressed the fact of filing of the suit.

64. It is also to be noted that in the said summary suit, the complainant company had sought recovery of an amount of Rs. Rs.4,40,43,566.31 in respect of the invoices. It was the case of the complainant company that the accused had failed to pay said amount despite notices dated 5th May, 2010. Thus the case of the complainant company in the said suit was that as on 5.5.2010 the accused were liable to pay a sum of

Rs.4,40,43,466.31, whereas the amount mentioned in the subject cheques dated 31.10.2009 was Rs. 4,50, 00,000/- . The demand in the statutory notice dated 13.4.2010 was also for an amount of Rs.4,50,00,000/-. It is thus evident that the amount mentioned in the cheques exceeds the amount claimed in the suit. The complainant company has not explained this discrepancy. The absence of explanation negates the contention of the complainant company that the amount quantified in the cheque was in fact the existing debt or liability.

65. Be that as it may, the issue in the case in hand was whether the Complainant had proved that the cheques were issued by the Accused towards legally enforceable debt or liability. In this regard the Complainant-company has relied upon the statement of account of account at Exh.'FF', a print out of electronic records allegedly maintained by the Complainant-company in the course of business. In the case of Anwar P.V. Vs. P.K. Basheer and Ors. Apex Court has held as under:

"Any documentary evidence by way of an electronic record under the Evidence Act, in view of Section 59 and 65A and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-

Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

66. In the instant case, the accused had challenged the admissibility of the statement at Exh.'FF' on the ground that CW2 was not the author of the said statement. He had not signed the said statement and had no knowledge about the entries made in the said statement. It was further alleged that CW3, who had issued the certificate purported to be under sub-section 4 of section 65B, was not competent to issue such certificate. It was further stated that the said certificate did not contain the details required under clauses (a) to (c) of sub section 4 of section 65B of the Indian Evidence Act.

67. The learned Magistrate while rejecting contentions has held that Section 65B of the Indian Evidence Act nowhere mandates that the

certificate is required to be issued only by the person having access to the system. The learned Magistrate has further held that since CW3 was working as Head IT, it can be gathered and concluded that he had control and lawful access over the entire computer system of the Complainant-company. The learned Sessions Judge has not addressed the question as to whether CW3 was competent to issue the certificate as envisaged under Sub Section 4 of Section 65 B of the Indian Evidence Act. Nevertheless, the learned Sessions Judge has relied upon the evidence of CW2 and CW3 by holding that the accused have not impeached the credibility of CW2 and that they have not refuted the genuineness of the certificate issued by CW3.

68. It is pertinent to note that, CW1-Vimukt Nayak, the power of attorney of the Complainant Company had neither produced the statement of account nor made any reference to such statement of account. The accused were therefore precluded from cross examining accused No.1 and eliciting such material as to refute the genuineness of the statement at Exh.'FF'. A perusal of the certificate shows that the same was signed and certified by Kailash Varodiya and Dattaram Patarpenkar. The Complainant-company has neither examined said Kailash Varodiya and Dattaram Fatarpenkar nor produced any material to show that said Kailash and Dattaram were authorised to sign the said statement on behalf of the Complainant-company.

69. It may be mentioned here that section 65B only relates to the admissibility of electronic records. This amended provision prescribes the mode for proof of contents of electronic records. The very admissibility of electronic records depends upon the satisfaction of the conditions stipulated in the section. Sub section 4 of section 65 B provides that when a statement has to be produced in evidence, it should be accompanied by a certificate containing the details specified in clauses (a) to (c) of Sub section 4 of Section 65 B. This certificate must be signed by a person "occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities".

70. CW2, who has produced the statement at Ex.FF, has admitted that he had not obtained the print out at Ex.'FF. CW2 had not signed the said statement and had admittedly no knowledge of the transaction. CW2 had not produced any document to prove that the said statement was a print out of a computer/electronic records maintained by the Company in the ordinary course of business. It is also to be noted that the statement at EX. FF was not accompanied by a certificate as contemplated under sub section 4 of section 65B of the Indian Evidence Act. The statement at Exh.'FF' was therefore not admissible in the absence of such certificate.

71. The Complainant-company had tried to rectify this defect by examining CW3 who was examined at the stage of final hearing. He has

produced the certificate purported to be under sub-section 4 of section 65B of the Indian Evidence Act. No reason has been assigned by the Complainant-company for not producing the said certificate alongwith the statement at Exh.'FF' and this fact leads to an inference that the said certificate was created subsequently to fill in the lacuna in the evidence of CW2.

72. Be that as it may, CW3 has deposed that he is looking after the maintenance of computer system of the Complainant-company since 2008-2009. He has deposed that apart from the maintenance work, he is not allotted any other work relating to information and technology. He has deposed that accounts of the Complainant-company are maintained and prepared by Operation Department and Client Relationship Department. He has admitted that he has not prepared statements of any of the clients of the Complainant-company. He has stated that he has no personal knowledge about the transaction. He has further stated that he had not personally verified the balance, which was due and payable by the accused to the complainant company as on 16.3.2011. He has stated that employee of the Complainant-company used to prepare and enter the statement at the user terminal and the same was saved in the main server. He has stated that he does not know when such data was entered in the user terminal or as to how many persons had entered such data in user terminal. He has stated that he is not a system administrator and that apart from system administrator no

other person has access to the server. He has deposed that he had not retrieved the information from the main server in respect of the present transaction.

73. A conjoint reading of evidence of CW2 and CW3 reveals that both these witnesses had no personal knowledge about the transaction. They were not entrusted with the duty of maintaining the records of the company. They had not prepared the statement of account and had no knowledge about the genuineness of the entries reflected in Exh.'FF'. The evidence of CW3 clearly indicates that apart from the system administrator no other person had access to the server. His evidence does not indicate that he was involved in the management of the relevant activities. The evidence of CW3 therefore, does not indicate that he was occupying an official position in relation to the operation of the device and was not entrusted with a duty of the management of the relevant activities. In short, the Complainant Company had failed to prove the source and authenticity of the statement as well as the competency of CW3 to issue the certificate. In this fact situation, the findings of both the courts below are totally erroneous and contrary to the evidence on record and the relevant provisions of law and have thus resulted in miscarriage of justice.

74. It has to be borne in mind that section 65B only relates to the admissibility of electronic records. It authenticates the genuineness of the

copy/computer printout and thus absolves the parties from producing the original. This section only makes the computer output admissible on complying with the requirements of the section. It does not prove the actual correctness of the entries and does not dispense with the proof or genuineness of entries made in such electronic records. Furthermore, there is no presumption regarding the genuineness of the entries in electronic records. Hence, it was necessary for the Complainant Company to prove the correctness of the entries. In the instant case, the witnesses examined by the complainant did not have any personal knowledge regarding the entries made in the said statement at Exh.'FF' and were therefore not competent to depose about the correctness of the entries.

75. It is also to be noted that section 34 of the Evidence Act stipulates that the entries in account books regularly kept in course of business are relevant piece of evidence and admissible. The section further states that such entries cannot be the sole basis of fixing liability on any person. In the instant case, apart from statement at Exh.'FF' the complainant company had not produced any other material to prove that the liability of the accused in respect of the amount specified in the subject cheques. Hence, the accused could not have been held guilty of the offence solely on the basis of the said statement.

76. The offence under section 138 of the NI Act though technical, is punitive in nature. Hence, once the accused had rebutted the initial presumption it was imperative upon the complainant to prove beyond reasonable doubt that the cheques were issued towards the existing debt or liability. In the instant case, the complainant has failed to discharge this burden. As a consequence thereof, the accused could not have been held guilty of the said offence.

77. Under the circumstances and in view of discussion supra, the impugned orders have resulted in miscarriage of justice and this necessitates exercise of revisional powers. Hence, the Revision Application is allowed. The Judgment and order dated 13/03/2012 passed by the learned Metropolitan Magistrate 12th Court, Bandra at Mumbai in C.C. No.821/SS/2010 and the judgment and order dated 28.8.2015 passed by the Sessions Court, Greater Bombay in Criminal Appeal No.338 of 2012 are hereby set aside. Consequently, the accused are acquitted of offence under section 138 read with 141 of the NI Act. Their Bail bonds stand discharged.

(ANUJA PRABHUDESSAI, J.)