

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CrI.R.C.No.211 of 2019

and

M.P.No.2136 of 2019

Ram Nitish Kotak

...Petitioner/Accused

Vs.

Arif Buhary Rahman

...Respondent/Complainant

PRAYER: The Criminal Revision filed under Section 397 read with 401 of the Code of Criminal Procedure, to call for the records and set aside the order of the Metropolitan Magistrate Court, Fast Track Court - II, Egmore, Allikulam in C.C.No.155 of 2013 and the order of the XV Additional Sessions Court, Chennai dated 25.09.2018 passed in Criminal Appeal No.193 of 2018.

For Petitioner : Mr.Krishna Srinivasan
for M/s.S.Ramasubramaniam
and Associates

For Respondent : M/s.A.E.Ravichandran

ORDER

The petitioner herein is an accused and the respondent is the complainant in this case. The respondent filed a private complaint against the revision petitioner under Section 200 of Cr.P.C., before the learned Metropolitan Magistrate, Fast Track Court-II, Egmore, Allikulam, alleging that he has committed the offences punishable under Section 138 of the Negotiable Instruments Act 1881. The learned Metropolitan Magistrate, after taking the complaint on file and completing the procedure formalities and trial in C.C.No.155 of 2013, convicted the accused under Section 255(2) of Cr.P.C., for the offence punishable under Section 138 of Negotiable Instruments Act, and sentenced to undergo simple imprisonment for a term of one year and directed to pay compensation for a sum of Rs.50,00,000/- as provided under Section 357(3) of Cr.P.C r/w Section 138 of Negotiable Instruments Act 1881, against which the petitioner has preferred an Appeal before the XV Additional Sessions

Court, Chennai in Crl.A.No.193 of 2018.

2. The learned XV Additional Sessions Judge, after hearing the arguments of both sides and also perusing the records, has confirmed the order of the learned Metropolitan Magistrate and dismissed the Appeal. Against the said judgment, the convict has preferred this Criminal Revision before this Court.

3. The learned counsel appearing for the revision petitioner would submit that the complaint was not filed by the complainant, it was filed through a Power of Attorney and the complainant has also not come and depose as a witness and he was not examined on his side. The learned Metropolitan Magistrate as well as the learned Sessions Judge failed to consider the facts as it is a settled proposition of law, that even though, complaint can be filed through a Power of Attorney, the Power of Attorney who has filed the complaint cannot give evidence as a witness on the personal knowledge about the transaction between the complainant and the accused, unless he has accused in the complaint that he has personal knowledge about the transaction. In this case, the Power of Attorney has not averred in the complaint that he has personal knowledge about the transaction and without any specific averments the complaint itself is not maintainable.

4. Further, it is submitted that the Power of Attorney cannot give evidence in the place of complainant unless he says that he has personal knowledge about the transaction between the complainant and the accused and in the absence of exclusive knowledge, the Power of Attorney cannot give evidence on behalf of the complainant in this case. Neither, the Power of Attorney has stated that he is conversant to the facts of the case and also the transaction between the complainant and the accused nor the complainant has come to the witness box and gave evidence. The Power of Attorney has given evidence in the capacity of the complainant is not acceptable and these facts has not been considered. In support of this contention, the learned counsel for the revision petitioner has placed reliance on the Judgment of the Hon'ble Apex Court reported in (2014) 11 Supreme Court Cases 790 A.C.Narayanan Vs. State of Maharashtra and Another, wherein it has been held as hereunder:

"Thus the Power of Attorney holder may be allowed to file the complaint, appear and depose and verify on oath before the court in order to prove the contents of the complaint for the purpose of issue of process for the offence punishable under Section 138 of the N.I Act. However, when the power of attorney holder of the complainant has not

witnessed or does not have a personal knowledge about the transactions, then he cannot be examined as a witness in the case. 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 complainant.

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."

15. In terms of Section 142 of the NI Act, 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. The learned Senior Counsel appearing for the appellant pointed out that with a non obstante clause, Section 142 provides that only two categories of persons, namely, the payee or the holder in due course of the cheque is entitled to file a complaint under Section 138 of the NI Act. According to the learned Senior Counsel for the appellant, in the first case, the verification statement of solemn affirmation has been made by the constituted attorney and not by the complainant. It is further pointed out that the verification affidavit made by the constituted attorney is not on the basis of her personal knowledge and hence, it would squarely fall within the ambit of hearsay evidence and cannot be read in evidence in a

court of law. By pointing out the same, the learned Senior Counsel for the appellant submitted that the constituted attorney is incompetent to depose on behalf of the complainants. In other words, according to the appellant, the power of attorney holder is not competent to depose about the transaction that took place between the payee and the drawer of the cheque. The learned Senior Counsel also pointed out that Section 2 of the Power of Attorney Act, 1882 cannot override the specific provisions of the statute which require that a particular act should be done in a particular manner (vide Nazir Ahmed V. King Emperor, Ravulu Subba Rao V. CIT). It was further pointed out by the learned Senior Counsel for the appellant that the decision in Ravulu Subba Rao was followed in Jimmy Jahangir Madan V. Bolly Cariyappa Hindley.

16. In view of the above, the learned Senior Counsel for the appellant relied on a decision of this Court in Janaki Vashdeo Bhojwani wherein this Court held that power of attorney cannot depose for the acts done by the principal. Likewise, it was further held that he cannot depose for principal in respect of matters of which only the principal can have personal knowledge and in respect of which the principal is liable to be cross-examined. It was further held that the power of attorney can appear only as a witness in respect of facts, which are within his personal knowledge.

25. This Court further held thus: (Janaki Vashdeo Bhojwani case, SCC

"17. On the question of power of attorney, the High Courts have divergent views. In Shambhu Dutt Shastri V. State of Rajasthan it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in Ram Prasad V. Hari Narain. It was held that the word 'acts' used in Order 3 Rule 2 CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the Court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In Pradeep Mohanbay V. Minguel Carlos Dias the Goa Bench of the Bombay High Court held that a power of attorney can file a complainant under section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in Humberto Luis V. Floriano Armando Luis on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to dis-entitle the power of attorney holder to depose on behalf of his principal. The High Court further held that the word 'act' appearing in Order 3 Rule 2 CPC, takes within its sweep 'depose'. We are unable to agree with this view taken by the Bombay High Court in Florianto Armando.

21. We hold that the view taken by the Rajasthan High Court in Shambhu Dutt Shastri followed and reiterated in Ram Prasad is the correct view. The view taken in Floriano Armando Luis cannot be said to have laid down a correct law and is accordingly overruled. "

5. The learned counsel would submit that in this case the complainant has not stated that his Power of Attorney is aware of the entire facts and also knowledge about the transaction. Therefore, the citation is purely applicable for the present case and therefore, the learned Metropolitan Magistrate and the learned trial Judge has failed to appreciate the settled proposition of law, laid down by the Hon'ble Apex Court judgment.

6. The learned counsel for the respondent would submit that there is no quarrel with the proposition that the averments in the complaint should disclose the personal knowledge of the

Power of Attorney. Whereas, in this case he has not specifically averred so in the complaint, but they produced the Deed of Power of Attorney and also complaint filed through a Power of Attorney. The recitals of the Power of Attorney Deed reveals that they have specifically stated that he is well acquainted and conversant with the facts of the case and has personal knowledge about the transaction between the accused person and the complainant. Therefore, the contention raised by the learned counsel for the revision petitioner is not acceptable.

7. Further, he would submit that even P.W.2, the accountant has been examined, who has personal knowledge about transaction therefore, in this case though the complainant was not examined, the Power of Attorney has been examined on behalf of complainant and P.W.2 the Accountant, has been examined for the transaction between the complainant and the accused. It is not in dispute that the revision petitioner has no transaction directly with P.W.2 and P.W.2 very well knows about the transaction and mere non-examination of the complainant himself is not fatal to the prosecution, when the person, who is well conversed to the business transaction and also to the issuance of the cheque, has been examined as P.W.2 and both the Courts have concurred that the complainant has proved his case beyond reasonable doubts and therefore, convicted the accused.

8. The scope of the revision is very limited, since, the revision is against the concurrent judgment of both the Courts. This Court has got limited jurisdiction while considering the revision, as this court finds no perversity in the orders of the courts below. Therefore, in these circumstances, the contention raised by the learned counsel for the revision petitioner is not acceptable and there is no reason to interfere in the case.

9. Heard the learned counsel appearing for the revision petitioner and the learned counsel appearing for the respondent and perused the entire records available on record.

10. The respondent complainant lodged a private complaint before the learned Metropolitan Magistrate and in order to prove the case on the side of the respondent/complainant, he examined two witnesses and 10 documents were marked. On the side of the petitioner/accused, three witnesses were examined and 5 documents were marked. Therefore, after perusing the materials placed on record, the learned Metropolitan Magistrate has come to the conclusion that the complaint was proved before the Court through P.W.1 and P.W.2. And P.W.2, who is an accountant, has clearly spoken about the transaction and also the issuance of the cheque and therefore, convicted the petitioner/accused. Against the same, the revision petitioner has preferred an Appeal before the

Sessions Court and the said appeal was also dismissed. Hence, the revision petition is before this Court.

11. On a careful reading of the entire evidence, it is seen that the issuance of cheque is not in dispute and transaction between the petitioner and respondent is also not in dispute. The only defence taken by the revision petitioner is that the complaint has not been filed by the complainant and complainant has not come to the witness box and examined as witness and the complaint has not been proved. A complaint has been filed through a Power of Attorney stating that the complaint has not averred of the Power of Attorney having conversant with the facts and also the transaction between the complainant/respondent. Further, the Power of Attorney/P.W.1 cannot give any evidence on behalf of the complainant about the transaction which were within the exclusive knowledge of the complainant and therefore, the Power of Attorney has no personal knowledge about transactions. However, this contention was not considered, by both the courts below.

12. The learned counsel appearing for the respondent would submit that though the complainant has not averred so in the complaint but in the Power of Attorney Deed, it has been clearly stated that Power of Attorney has knowledge about the transaction and also he is well conversant to the facts and hence therefore, the complaint has been filed only based on the Deed of Power of Attorney. Further, to prove the transaction, the P.W.2, accountant has been examined and documents have been filed. On going through the document Ex.D2, E-Mail addressed by the witness, to the accused it is very much clear that P.W.2 is well aware of the transaction and also has personal knowledge about the issuance of cheque. Since, there is no dispute with regard to the transaction between the petitioner/accused and the respondent/complainant, and the respondent/complainant having discharged his initial burden through Exs.P8 to P10 series and other E-mail communications, the onus of proof is now shifted on the petitioner/accused to rebut the presumption that is available in favour of the complainant under Section 118 and 139 of the Negotiable Instruments Act, in the manner known to law.

13. Both the Courts have gone in to the said statutory presumption and held that mere denial of the allegation would not amount to rebuttal of presumption and the defence taken by the accused must be supported by documents. The Courts below concurrently found that the respondent/complainant has discharged his initial burden by producing primary documents in support of his case and the defence taken by the petitioner/accused is only a bald, without any supporting documents, in the manner known to law. Therefore, this Court, while exercising revisional jurisdiction, cannot re-appreciate

the entire evidence and reverse the concurrent findings of the Courts below, which are well-founded.

14. Therefore, this Court does not find any perversity in the orders passed by the Courts below. However, answering the query raised by the learned counsel for the revision petitioner that Power of Attorney has no power to file the complaint especially when there is no averment that he has personal knowledge about the transaction. Therefore, the complaint itself could not have taken on file and the learned Metropolitan Magistrate committed an error by taking the complaint on file, as laid down by the Hon'ble Apex Court. The above contention raised by the learned counsel for the revision petitioner is not acceptable for the reason that though in the complaint there is no averment, but, at the same time, along with an application, the Power of Attorney Deed was marked as Ex.P1 through P.W.1. On a reading of Ex.P1, it is very clearly stated that the power holder has complete knowledge of the transactions and therefore, in these circumstances, the contention raised by the learned counsel is not acceptable and the same is rejected. This Court does not find any perversity in the finding recorded by the Courts below in this regard.

15. Furthermore, the recitals of Ex.P.1 can be very well taken in to account by the Court while deciding the case that the Power of Attorney cannot give evidence in the place of the complainant, when the fact is within the exclusive knowledge of the complainant. However, admittedly, in this case in view of well settled in the proposition of law, the Power of Attorney can file the complaint, as he has personal knowledge of the transaction, as evident from the recitals of Ex.P.1, Deed of Power of Attorney. Furthermore, in this case admittedly P.W.2 who is an accountant, has spoken to about the transaction and it is not the case of the revision petitioner that the transaction is only within the exclusive knowledge of the complainant.

16. Therefore, the contention raised by the petitioner/accused in this regard is also not acceptable and is not legally sustainable, therefore, it is rejected. It is well settled proposition of law, therefore, that the Power of Attorney can give evidence on his own of the facts which he was made aware, but cannot give evidence about the facts which are only within the exclusive knowledge of the principal in this case, as stated earlier. However, in this case the non-examination of the complainant is not fatal, since P.W.2 accountant, who has dealt with transaction between the revision petitioner/accused, has been examined as P.W.2 and he has clearly spoken not only about the transaction, but also about the issuance of cheque. The revision petitioner has not disputed the transaction with the complainant and the issuance of the cheque. Though the petitioner has not emphasized regarding the

merits of the case, the learned counsel emphasized on technical ground that the complaint itself is fatal, since the Power of Attorney has not averred in the complaint of his knowledge about the transaction.

17. Further, the Power of Attorney cannot give evidence in the place of principal and he has stated that the complainant has to come to the witness box and speak about the transaction. However, Ex.P1, Power Deed itself clearly states the knowledge about the transaction and the evidence of P.W.2 also clearly states that it is not within the exclusive knowledge of the complainant and therefore, P.W.2 is aware of the transaction. Therefore, under these circumstances the citation referred by the learned counsel for the revision petitioner is not made applicable to the present case. The facts of the present case is entirely different from the case dealt with by the Hon'ble Supreme Court in the above referred decision.

18. Therefore, under these circumstances, this Court considering the facts and circumstances of the case, holds that once the revision petitioner accepted the transaction and even the signature is found in the disputed cheques, both the Courts have safely drawn the statutory presumptions that accused has not rebutted the presumption.

19. Therefore, in these circumstances this Court does not find any perversity or infirmity in the judgment of both the Courts below. Therefore, the Revisional Court cannot substitute with its own view, when there is no perversity and there is no merit in the revision and the revision is liable to be dismissed.

20. Accordingly, this Criminal Revision is dismissed. Consequently, connected miscellaneous petition is also closed.

Sd/-

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Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ssi/rna

To

1. The Metropolitan Magistrate Court, Fast Track Court - II, Egmore, Allikulam.

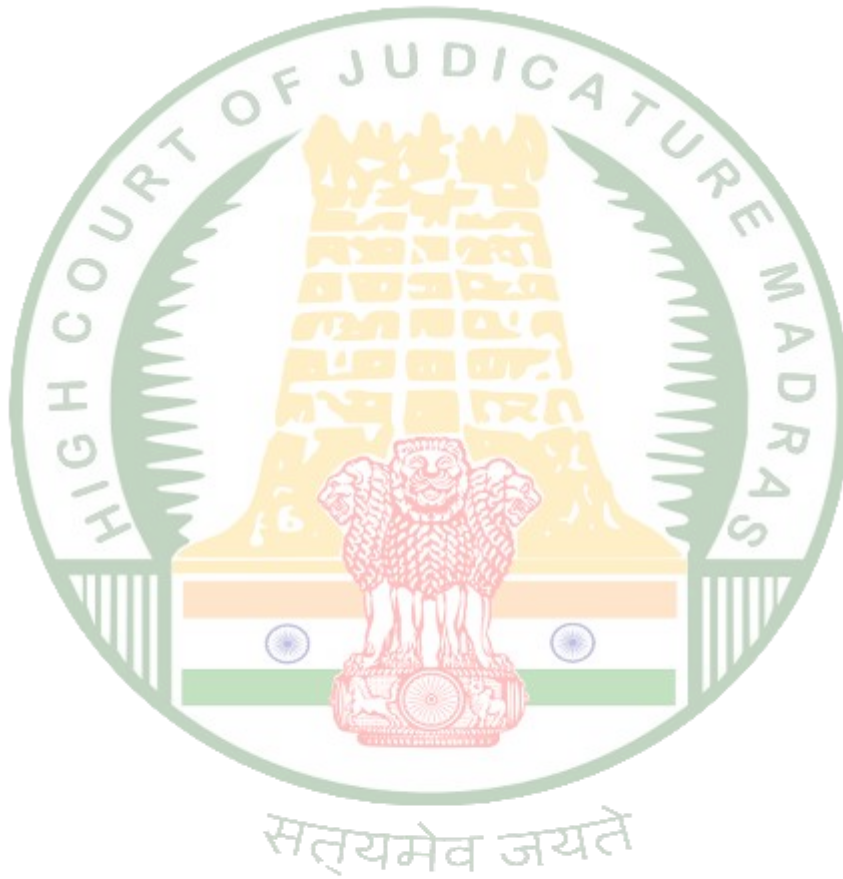
2. The XV Additional Sessions Court, Chennai.

+1cc to M/s.A.E.Ravichandran, Advocate sr.18679

+1cc to M/s.S.Ramasubramaniam and Associates, Advocate sr.18858

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