

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL REVISION APPLICATION NO.108/2021

APPLICANT : Vikky s/o Abhay Nikose
Aged 39 years, Occu – Business,
Resident of House No.10548, Ashok
Nagar, Kamal Chowk, Nagpur, Tahsil
and District Nagpur.

...VERSUS...

RESPONDENT : M/s Navbharat Press, A registered
partnership firm, having its office at
Chhatrapati Square, Wardha Road,
Nagpur, through its Authorized Signatory
POA Recovery In-charge,
Maheshprasad Gokulprasad Sarangi,
Aged 44 years, Occ – Service,
Resident of Nagpur.

Mr. N. A. Gaikwad, Advocate for applicant
Mr. P P Salunkhe, Advocate for respondent

CORAM : AVINASH G. GHAROTE, J.
DATE : 15/03/2022

ORAL JUDGMENT

1. Heard Mr. Gaikwad, learned Counsel for the applicant
and Mr. Salunkhe, learned Counsel for the respondent. Rule. Rule
made returnable forthwith. Heard finally with the consent of the
learned Counsel for the rival parties.

2. The present application raises an interesting question regarding the presumption under Section 85 of the Indian Evidence Act, 1872. To understand the position appropriately, few facts are narrated as under :

The complainant is a partnership firm dealing in the business of publication of advertisement in the newspaper, local daily 'Navbharat'. The applicant/accused is the Proprietor of M/s Reena Art Advertising Agency. It is alleged that there were transactions between the complainant and the accused, who caused to be published advertisements of his clients in 'Navbharat', through the complainant, and on every gross bill amount, the accused was entitled to 15% commission. It is further stated that the accused had caused to be published four advertisements in the local daily 'Navbharat' through the complainant, of his client namely, Kashiba Sales and Vedita Agro/EDU Computer Private Limited on various dates i.e. on 19/11/2011, 11/11/2011, 24/11/2011 and 26/11/2011 respectively, as per the details given in para 3 of the complaint (page 23), in pursuance to which, four cheques dated 25/12/2011, 02/01/2012, 08/01/2012 all for Rs.9,180/- each and a cheque dated 11/01/2012 for Rs.7,650/- all drawn on Shikshak

Sahakari Bank Ltd., Branch Panchpaoli, Nagpur, were claimed to have been issued by the accused/applicant in favour of the complainant. All these cheques were presented for realization by the complainant with its Bank namely, Bank of Maharashtra, Sitabuldi, Nagpur and were returned as dishonoured under the Bank Memos dated 04/01/2012, 11/01/2012, 17/01/2012 and 17/01/2012 respectively with an endorsement that there were insufficient funds in the account of the accused. A legal notice was issued on 25/01/2012 by the complainant through its Advocate Mr. J.S. Bamrah, which was sent on 28/01/2012 through RPAD demanding the aforesaid cheque amounts, which was claimed to have been served on and received by the accused/applicant on 30/01/2012 and there being no compliance a complaint came to be filed on 22/02/2012.

3. The learned Trial Court by the judgment dated 07/05/2013 has convicted the accused for the offence punishable under Section 138 of the Negotiable Instruments Act and has sentenced him to suffer R.I. for three months. A further compensation under Section 357(3) of the Code of Criminal

Procedure of Rs.70,000/- has been directed to be paid to the complainant within one month from the date of order, in default, further R.I. for six months has been awarded. The appeal filed against this conviction and sentence came to be dismissed by the learned Sessions Court by the Judgment dated 07/07/2021, resulting in filing of the present revision.

4. Mr. Gaikwad, learned Counsel for the applicant contends, that the institution of the complaint itself was infirm in as much as though the complainant was a partnership firm, the complaint has been filed by one Mahesh Prasad Sarangi claiming to be authorized signatory/Power of Attorney (POA) of the firm. The complaint has been filed on 22/02/2012. Inviting my attention, to Exh.54 the Special Power of Attorney dated 03/06/2009, executed by the then partners of the firm, in favour of Mr. Mahesh Prasad Sarangi, he contends that, the said power of attorney does not bear the signature of the witnesses, nor does it bear the signature of the said Mahesh Prasad Sarangi in whose favour the same has been executed. It is further contended that the endorsement of the Notary thereupon merely states "attested" above the signature of the

Notary. It is, thus, contended that, in view of the requirement of Section 85 of the Evidence Act there was no presumption available in respect of the Special Power of Attorney (Exh.54), as the same was not authenticated and therefore, no complaint could have been filed by the said Mahesh Prasad Sarangi on behalf of the partnership firm claiming to be duly authorized by virtue of the said power of attorney. He further submits, that in absence of any authentication, the presumption, as contemplated by Section 85 of the Evidence Act was not available and in absence of the executant to the said document stepping into the witness box, the same could not have been proved by the alleged attorney namely, Mahesh Prasad Sarangi, which was also for the reason, that there were no witnesses to the said power of attorney and therefore, the question of examining them did not arise at all. In order to buttress his submission, that authentication is something different than mere attestation so as to draw the presumption under Section 85 of the Evidence Act, reliance is placed upon *Wali Mohammad Chaudhari and others Vs. Jamal Uddin Chaudhari, AIR (37) 1950 Allahabad 524* (para 3), *Jugraj Singh and another Vs. Jaswant Singh and others, AIR 1971 SC 761* (para 6), *Citibank N.A., New Delhi Vs. Juggilal Kamlatpat Jute Mills*

Co. Ltd., Kanpur, AIR 1982 Delhi 487 (paras 17, 18, 19 and 20), *M/s. Electric Construction and Equipment Co. Ltd. Vs. M/s. Jagjit Electric Works, Sirsa (Haryana), AIR 1984 Delhi 363* (paras 8 and 11), *Kamla Rani and Ors. Vs. M/s. Texmaco Ltd., AIR 2007 Delhi 147* (paras 33, 35 and 37), *H. K. Taneja and others Vs. Bipin Ganatra, 2009 (2) Mh. L. J. 855* and *Jaldhi Overseas Pvt. Ltd. Vs. Bhushan Power and Steel Limited, 2017 SCC OnLine Cal 4414*.

4.1. It is further submitted that the subsequent power of attorney dated 05/05/2010 at Exh. 23 also did not come to the assistance of the complainant as the same though notarized, was merely attested by the Notary and not authenticated as required under Section 85 of the Evidence Act, and therefore, the presumption as contained therein was not available, and also could not have been proved by the attorney in whose favour it was executed. It is also submitted that there was no element of ratification in this subsequent power of attorney.

4.2. Insofar as, the merits of the matter is concerned, learned Counsel submits, that the order form at Exh.27 and the

Invoice at Exh.28, did not indicate, that they were drawn on the accused/applicant but were drawn on Mr. Vinod Wakhare, who was admittedly the Manager of the complainant firm and therefore, had no concern with the accused. It is further submitted that the size mentioned in the order form was also different than the size of the advertisement published, which would indicate that it was not in consonance with the order form or the invoice. To cite an example, he submits that, the order form at Exh.27 indicates that the size would be 10 cm. X 2 cm. (page 55) as against which what has been published is something more than that at Exh.29 (page 56), which is 10 cm. X 12 cm. He also submits, that there is nothing on record to indicate that a commission of 15% in respect of those advertisements was ever given to the accused. This is the position, according to him, in all the other documents relating to the other three advertisements claimed to have been published on behalf of the accused. Further inviting my attention, to the averments in the affidavit in lieu of evidence (pg. 20 of paper-book) it is submitted that it has been specifically averred that the accused would be entitled for 15% commission on gross billing after realization of payment, however, the document at Exh.27 (pg.55) indicates, that

the rate quoted is Rs.540/- less 15% which would indicate that the advertisement had not been given by the accused but by the client directly to the complainant. It is therefore submitted that the contention that the cheques were given for the purpose of security in due course of business would stand justified. He submits that the judgments of the learned Judicial Magistrate First Class as well as that of the Sessions Court which do not consider the above position, cannot stand to reason and therefore, ought to be quashed and set aside.

5. Mr. Salunkhe, learned Counsel for the complainant controverts the above contentions. Insofar as the argument regarding maintainability of the complaint is concerned, he submits that the complaint by the firm through its Recovery Officer and the Power of Attorney would be maintainable. He further contends that the Special Power of Attorney (Exh.54) was duly attested by a Notary Public and even if it was not signed by any witnesses or by the attorney, the same ought to have been held to have been proved even if the executants thereof were not examined. He further submits that even if there may be some anomaly in the said Power of

Attorney, the same stood cured by virtue of the second power of attorney at Exh.23 dated 05/05/2010, which was signed by the attorney, who has entered into the witness box to prove its contents and non-examination of the witnesses or the executants of Exh.23 would not come in the way of the complainant, in the matter of institution of proceedings. He places reliance upon ***M/s. Credential Finance Ltd. Vs. State of Maharashtra and others, 1999 CRI. L.J. 1032***, which holds that in the complaint filed by the Company through its Manager, the production of the authorisation not being a precondition for filing of the complaint, cannot be a ground, to throw away the complaint at the initial stage. Further reliance is placed upon ***Sagayadurai Vs. J.D. Electronics etc. etc. 1997 (3) Civil L.J. 128***, to contend that the complaint filed by the Manager of a partnership firm in absence of any power of attorney or authorization was maintainable in law and could be taken cognizance of under Section 141 of the Negotiable Instruments Act. Reliance is also placed on ***K. A. Pradeep s/o Appukuttan Vs. Branch Manager WP (C) No.37043 of 2004***, decided by the learned Single Judge of the Kerala High Court on 27/07/2007, which holds that though the endorsement made upon the Power of Attorney by the

Notary was unsatisfactory, however, it could not be said that it was not a document which could not be purported to be a POA executed and authenticated by a Notary Public, more so, when it bore the seal of the Notary as non-attestation by witnesses would not be fatal since it is not obligatory that a POA should be attested by two witnesses and what was necessary was only authentication; ***Taraben d/o Nanubhai Kasanbhai Patel Vs. Shaileshbhai Rangilbhai, A.O. No.199/2012*** decided by the learned Single Judge of the Gujarat High Court on 26/02/2013 (para 11 and 13); ***M/s TRL Krosaki Refractories Ltd. Vs. M/s SMS Asia Private Limited and another, 2022 Live Law (SC) 196*** (para 14 and para 17), which speaks about an authorized person being witness to the transaction and having knowledge of the case can institute the complaint on behalf of the payee company, are also relied upon.

5.1. Insofar as the merits of the matter is concerned, he contends, that the accused was having business relations with the complainant since long and it is on the basis of those longstanding business relations, that the advertisement was issued on the say so of the accused and the order form and invoices were raised in the

name of the party directly, which according to him, was a normal practice. That apart, in all the advertisements issued, name of the firm of the accused M/s Reena Art Advertising Agency was also mentioned, which would indicate the publication of the advertisement at the behest of the accused. He therefore submits that all other things remaining the same, the dishonour of the cheques was duly proved; the service of notice of demand and the non-compliance thereof also stood proved, resultant to which, the conviction based upon such proof, could not be interfered with in revision by the accused.

6. Section 142 (1) of the Negotiable Instruments Act, 1881 being relevant is reproduced as under :-

“142. Cognizance of offences. - (1) 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).....

(c).....”

Section 142 (1) of the Negotiable Instruments Act contains a *non obstante* clause and Section 142 (1) (a) mandates that no Court shall take cognizance of any offence punishable under Section 138 of the Negotiable Instruments Act except upon a complaint, in writing, made by the 'payee' or, as a case may be, the 'holder in due course' of the cheque. It is thus apparent, that no Court can take cognizance of an offence under Section 138 (a) of the Negotiable Instruments Act unless the complaint is made by the persons, as enumerated in Section 142 (1) (a) namely, the 'payee' or 'the holder in due course' of the cheque. In the instant case, the payee is M/s Navbharat Press, Nagpur in whose favour the cheque has been drawn and therefore, M/s Navbharat Press Nagpur was legally entitled to institute the complaint.

7. It is, however, necessary to note, that the complaint has not been filed by M/s Navbharat Press, Nagpur through its partners, but through its authorized signatory POA, Recovery Incharge, namely, Mahesh Prasad s/o Gokul Chandra Sarangi. A perusal of the complaint, would indicate that the same has been signed by Mr. Mahesh Prasad Sarangi and the verification thereof has also

been done by said Mr. Mahesh Prasad Sarangi in his capacity as Power of Attorney for the complainant firm as is indicated in the record and proceeding, which is received in the present revision. Thus, it will have to be seen whether the said Mahesh Prasad Sarangi, was duly authorized by a Power of Attorney in this regard. To contend that this was indeed so, reliance is placed upon Exh.54 the Special Power of Attorney dated 3/6/2009. A perusal of this Special Power of Attorney indicates that the then partners of Navbharat Press (Nagpur) have appointed Mahesh Prasad Sarangi as a constituted attorney of the said partnership firm for the purpose of filing of the complaint. The Power of Attorney is signed by the then partners of the complainant. What is material to note, is that this Special Power of Attorney is not signed by any witnesses nor by the said attorney Mahesh Prasad Sarangi. The same is attested by the Notary Public Damodhar P. Lilhare on 03/06/2009. The attestation is a singular word “attested” and nothing else. In this context, Section 85 of the Indian Evidence Act being material is reproduced as under :

“85. Presumption as to powers-of-attorney.- The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and

authenticated by, a Notary Public, or any Court, Judge, Magistrate, [Indian] Consul or Vice-Consul, or representative of the [Central Government] was so executed and authenticated.”

8. The presumption therefore under Section 85 of the Evidence Act would only be attracted, if such power of attorney has been “executed before and authenticated by” a Notary Public. The nature of presumption is also indicated in Section 85 of the Evidence Act and is to the effect that such execution and authentication, shall be presumed by the Court in case the requirements under Section 85 of the Indian Evidence Act stand satisfied.

9. The expression “execution” in relation to a document would consist in signing a document written out, read over and understood and does not consist of merely signing a blank paper [see : *Mirza Gorgani Vs. Firm Bhola Mal Nikal Chand*, AIR 1934 Lahore 239 (2) and *Pirbhu Dayal Vs. Tula Ram*, AIR 1922 Allahabad 401]. Thus, the expression “executed before” as occurring under Section 85 of the Evidence Act would naturally require the aforesaid acts to have been done in presence of a Notary Public and the endorsement of the Notary Public in this regard certifying that it was

so done before him has to be reflected from the endorsement upon the Power of Attorney, made by the Notary Public.

10. The word “attest” means, according to the Shorter Oxford Dictionary ‘to bear witness to, to affirm the truth of genuineness of, testify, certify’. The word “attested” has not been defined in the Indian Evidence Act or the Powers-of-Attorney Act, 1882, nor in the Registration Act, 1908 or the Notaries Act, 1952. Section 3 of the Transfer of Property Act, 1882 defines “attested” in relation to an instrument as under :

“3. Interpretation clause.—

“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at

the same time, and no particular form of attestation shall be necessary.”

In general parlance the word “attest”, is used in relation to documents, which require compulsory attestation by witnesses such as a sale-deed, agreement of sale, lease, Will and deeds, which are required to be attested and would mean to bear witness to a fact; to attest an instrument is not merely to subscribe one’s name to it as having being present at its execution, but includes also essentially his being in fact present at execution. In ***N. Kamalam Vs. Ayyasamy, (2001) 7 SCC 503*** while considering the meaning of an attesting witness to a ‘will’ as required under Section 63 of the Indian Succession Act, the Hon’ble Apex Court after noticing what the Full Bench of the Madras High Court had held in ***H. Venkata Sastri and Sons and others Vs. Rahilna Bi and others, AIR 1962 Mad 111***, which in turn had relied upon the observations of *Lord Campbell in Burdett Vs. Spilsbury (1843) 10 C and F 340*, held that the ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could then alone vouch for the execution of the document. In other words, the attesting witness must see the execution and sign. Further,

attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the executant, it is obvious that he should have the necessary intention to vouch it. The ordinary meaning of the word is thus in conformity with the definition thereof under the Transfer of Property Act before it was amended by Act 27 of 1926. Before that amendment, admission of execution by the executant to a witness who thereupon puts his signature cannot make him an attester properly so called, as he not being present at the execution, cannot bear witness to it; a mere mental satisfaction that the deed was executed cannot mean that he bore witness to execution. Thus, of the two significant requirements of the term 'attest', namely, (1) that the attester should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution by subscribing his name as a witness, which implies a consciousness and an intention to attest.

11. In *Seth Beni Chand (Since Dead) Now By L.Rs. Vs. Smt. Kamla Kunwar and others*, (1976) 4 SCC 554 it was held that by attestation is meant the signing of a document to signify that the attester is a witness to the execution of a document. In *D.R. Rathna*

Murthy Vs. Ramappa, (2011) 1 SCC 158, it has been held that the word attestation means certification of a genuineness of a document.

12. Under the Powers-of-Attorney Act, 1882 Section 1-A defines a power of attorney to include any instrument empowering a specified person to act for and in the name of the person executing it, thereby indicating the POA is also an instrument and would thus require a document in writing to be executed for the purpose of authorizing the donee to act in consonance to the powers conferred thereupon, upon the donee, by the donor. Such a POA, in case it relates to an immovable property, would be an instrument which would compulsory require registration under Section 32/33 of the Registration Act.

13. However, the word “attestation”, when used in terms of what the Notary appointed under the Notaries Act, 1952 is required to do would take it out from the ambit of being a witness to the instrument/document, as contemplated by Section 3 of the Transfer of Property Act for the reason that when a Notary Public attests a document or a POA for that matter, he bears witness not to the

statements in the documents/POA , but to the fact of the making of those statements, and therefore, the attestation by a witness, cannot be equated with the attestation by the notary.

14. That takes me to the requirement of Section 85 of the Evidence Act *vis-a-vis* a POA regarding the presumption to be made. What is material to note, is the nature of presumption, which is permissible to be made and on what ground such presumption can be made. The nature of the presumption is spelt out from Section 85 of the Evidence Act, which is about the execution and authentication of the POA, however, such presumption would be available only in case, if the document purporting to be a POA is executed before and authenticated by a Notary Public or the authorities stated therein. What is also material to note is the effect of such presumption, which once drawn results in presuming the existence of a particular state of things and does away with the mode or manner, in which such thing/act is to be proved in a normal way, by either examining the executant/s or the witness/es.

15. The word “authenticated”, as held in ***Wali Mohammad Chaudhari*** (supra) would mean that the person authenticating, has assured himself of the identity of the person, who has signed the instrument as well as the fact of the execution, and only in case, this is spelt out from the endorsement made, that the presumption under Section 85 of the Evidence Act can be invoked.

16. Wharton's Law Lexicon 1976 defines authentication, to mean an attestation made by a proper officer by which he clarifies that a record is in “due form of law and that the person who certifies it is the officer appointed so to do”.

17. In ***Citibank N.A., New Delhi*** (supra), it has been held that the authentication is not merely attestation but something more and words “due form of law” are very important and would include the competence of the person executing the power-of-attorney in respect of which, the notary/public has to satisfy himself, and in the absence of Section 85 of the Evidence Act, any party relying upon a power-of-attorney would have to prove it like any other document by producing in the witness box, the executant of the document or the

person in whose presence it was so executed or the person acquainted with the signature of the executant etc., as the case may be and in case the doner is a company, it would be further required to prove that the person/s executing the power-of-attorney on its behalf had been duly authorized by means of a resolution duly passed in accordance with law and the Articles of Association.

18. In Law Lexicon by ***P Ramanatha Aiyar, 3rd Edition, 2005,*** ‘authenticate’ and ‘authentication’ have been defined as under:-

“Authenticate:- To give legal validity to; to establish the genuineness of; to make an authentication i.e., an attestation made by a proper officer by which he certified that the record is in due form of law, and that the person who certifies it is the officer appointed to do so.

Authentication:- 1. Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being so proved (authentication of the handwriting).

2. Specific., the assent to or adoption of a writing as one’s own.

Authentication is the process of validation the identity of someone or something. (Information Technology)

The Act of authenticating.

A process used to confirm the identity of a person or to prove the integrity of the specific information.

(Information Technology) Statement that something, is true, such as an auditor's signature on a company's accounts."

19. Section 33 of the Registration Act, 1908 delineates which power-of-attorneys are recognizable for the purposes of acts to be done under Section 32 of the Registration Act. Section 33 of the Registration Act, 1908 reads as under :

"33. Power-of-attorney recognizable for purposes of section 32. - (1) For the purposes of Section 32, the followed powers-of-attorney shall alone be recognised, namely :-

(a) if the principal at the time of executing the power-of-attorney resides in any part [India] of in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides;

(b) if the principal at the time aforesaid [resides in any part of India in which this Act is not in force], a power-of-attorney executed before and authenticated by any Magistrate;

(c) if the principal at the time aforesaid does not reside in [India], a power-of-attorney executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, [Indian] Consul or Vice-Consul, or representative of the Central Government:

Provided that the following persons shall not be required to be to attend at any registration office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (a) and (b) of this section, namely:-

(i) persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend;
(ii) persons who are in jail under civil or criminal process; and

(iii) persons exempt by law from personal appearance in Court.

2. In the case of every such person the Registrar or Sub-Registrar or Magistrate, as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

3. To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Magistrate may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

4. Any power-of-attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or Court herein before mentioned in that behalf.

20. Clauses (a) to (c) of Section 33 (1) of the Registration Act clearly indicate the requirement of an authentication to be there in case a POA is to be recognized for the purposes of Section 32 of the Registration Act. Sub section 2 of Section 33 further indicates the requirement of the Registrar/Magistrate of having been satisfied as to the voluntary execution of the POA by the person purporting to have executed the same, and Section 33 (4) indicates that such POA may be proved by its production without any further proof if, on the face of it, it indicates to have been 'executed before and authenticated' by the person as stated in Section 33 (1) (a) of the Registration Act. Thus, even under the provisions of Section 33 of the Registration Act mandate that (a) the POA has to be 'executed before and authenticated by' the person as indicated in Section 33 (1) (a) i.e. the Registrar or Sub Registrar, the Magistrate [Section 33 (1) (b)] and a Notary Public, Court, Judge, Magistrate, Consul or Vice-Consul, or representative of the Central Government [Section 33 (1) (c)], (b) the execution of such POA has been voluntary by the Principal, (c) satisfaction as to the identity of the Principal and (d) the endorsement on the POA should disclose (a) to (c) above.

21. In this context, Section 34(3) of the Registration Act, which casts a duty upon the registering officer to make an enquiry regarding the person presenting the documents for registration before him being material is reproduced as under :

“34 (1).....

(2).....

(3) The registering officer shall thereupon-

(a) enquire whether or not such document was executed by the persons by whom it purports to have been executed;

(b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and

(c) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such persons so to appear.”

22. The above would indicate what inquiry the registering officer is required to make before registering a document, which consists whether or not the document was executed by the person by whom it purports to have been so executed and satisfaction about the identity of the person appearing before who alleges to have executed the document.

“FORM V”

Seal *Signature of the Registrar/Sub-Registrar.*

FORM 'W'

*This power of attorney has been voluntarily executed by
..... occupation..... age.... at present residing at[I
have satisfied myself in this behalf by personal examination of
..... by examination of the aid
.....on commission]*

<i>Dated</i>	<i>19</i>	<i>Signature of the person identifying the principal</i>
<i>Seal</i>		<i>Signature of the Registrar/Sub-Registrar.”</i>

24. Form-V which prescribes the Form of authentication, indicates that the registering authority is required to record his satisfaction regarding the execution of the power-of-attorney in his presence and the identity of the person executing the same, both of which, has to be spelt out from the authentication made upon the document itself. Even Form-W, which relates to ‘attestation’, mandates, the satisfaction of the Registrar as to the identity of the expectant and voluntary execution of the POA, which is disclosed from the endorsement itself.

25. It is, thus, apparent that the attestation and/or authentication by a Notary Public are all together different from the attestation by a witness.

26. Since a power-of-attorney empowers the donee to act for and on behalf of the doner by executing document or doing such

acts and things as are permissible under the powers conferred upon the donee under the power-of-attorney, it is a settled position of law that a power-of-attorney has generally speaking to be strictly construed, meaning thereby a donee is incapable of acting or taking actions for and on behalf of the donor, over and above the powers which are contained in the power-of-attorney in his favour [See: *Syed Abdul Khader Vs. Rami Reddy and others, (1979) 2 SCC 601*- which also holds that power-of-attorney is not a document, registration of which is compulsory].

27. In *M/s. Electric Construction and Equipment Co. Ltd.* (supra), the learned Division Bench of the Delhi High Court has held that Section 85 uses the expression “executed before, and authenticated by”, and therefore, both these conditions must be satisfied before the presumption under Section 85 of the Evidence Act, would be available as merely an attestation by Notary Public would not suffice, to raise a presumption under Section 85 of the Evidence Act.

28. In *Kamla Rani* (supra) while holding that Section 85 of the Evidence Act was mandatory by relying upon *M/s. Electric Construction and Equipment Co. Ltd.* (supra), it has been held that the authentication by Notary Public is a solemn act performed by the Notary Public whose duty is to ensure the executant is the person before him and is identified to his satisfaction, only upon which the presumption would be attracted.

29. Even in *H.K. Taneja* (supra) it has been held that there is no presumption of execution of a notarized document, in case of a dispute raised in that regard and it would be for the person concerned to prove the factum of notarization also, by requiring the production of the relevant notarial register of the Notary, kept in the normal course of his conduct as such Notary, to prove the execution of the document before him.

30. Neither the Powers-of-Attorney Act, 1882 nor Chapter X of the Indian Contract Act, 1872 or the Notaries Act, 1952, the Indian Evidence Act, 1872, the Transfer of Property Act, 1882 mandate that the power-of-attorney, is a document required to be

attested, within the meaning of the expression as defined in Section 3 of the Transfer of the Property Act, as is required in the case of a Gift under Section 123 of the Transfer of the Property Act, a “Will” under Section 63 of the Indian Succession Act, 1925 and documents under Section 17(1) or 17 (1-A) of the Registration Act. However, if such a power of attorney is to be registered, then the same would require attesting witnesses at the time of registration, which is the procedure, which is followed in all registration offices, for the purpose of registering a power-of-attorney.

31. It is, thus apparent that ‘authentication’ is something more than ‘attestation’ as the same involves ensuring that executant is the person before him and is identified to the satisfaction of the Notary Public; the record being in due form of law; the executant confirming his knowledge regarding the contents of the documents to be true and genuine; the actual execution of the document before him and the executant having admitted voluntarily to have executed the POA coupled with the appropriate register maintained by the Notary Public in this regard, with according entries, therein.

32. The power-of-attorney at Exh. 54, has therefore, to be considered and viewed in the light of the above position. Perusal of this power-of-attorney at Exh. 54 dated 03/06/2019 would indicate, that it is not signed by any witnesses, nor is the power-of-attorney signed by the donee. The endorsement of the Notary Public bears only one word “attested” and nothing else. It is, thus apparent that the power-of-attorney does not bear an endorsement of the Notary Public of the due satisfaction of the identity of the executant, nor of the voluntary execution thereof or for that matter the genuineness of the document. In my considered opinion, considering that Section 85 of the Evidence Act uses the expression “executed before and authenticated by” the endorsement by the Notary Public ought to indicate satisfaction of this requirement before any presumption under Section 85 of the Evidence Act needs to be drawn. The expression “executed before and authenticated by” and the nature of presumption that the power-of-attorney “was so executed and authenticated” would mandate that the endorsement has to necessarily disclose, from a bare perusal/reading of the same, the satisfaction of the Notary Public, on the aforesaid terms, as to the (a) identity of the executant (b) genuineness of the POA, on account of

the executant admitting to have understood the contents thereof and agreeing them to be true and correct and binding upon him (c) the actual execution of the POA before the Notary Public and (d) the voluntary execution of the POA. This is more so for the reason that such an endorsement if accepted would necessarily preclude the proving of the POA in the normal way, by examining either the executant/s or witness/es and therefore there has to be a strict compliance with the requirement as contained in Section 85 of the Evidence Act, if the presumption has to be drawn. However, all these requirements are absent in the present case, considering which, the presumption under Section 85 of the Evidence Act was clearly not available in respect of the power-of-attorney dated 03/06/2009 at Exh. 54.

33. As held in *M/s. Electric Construction and Equipment Co. Ltd.* (supra) where the presumption under Section 85 of the Evidence Act is not available in absence of an authentication, it can still be proved by establishing due execution by producing the necessary witnesses/executant or any other mode as is permissible under the Evidence Act. However, in the instant case, it is the donee/

attorney, who is not the signatory to the power-of-attorney, who is the person who is claimed to have proved the power-of-attorney, which act, in my considered opinion, is not permissible under the Evidence Act.

34. *Jaldhi Overseas Pvt. Ltd.* (supra) was a case in which the execution of the power-of-attorney was duly witnessed by the Notary Public of Singapore, who had identified and authenticated the signature of the executant and the notarial certificate itself stated that the executant of the power-of-attorney herself had signed the document. Further the entire process of notarization of the power-of-attorney as well as the identification and authentication of the executant by the attorney was further certified by the Singapore Academy of Law through its Director and was further certified by the Ministry of Foreign Affairs (Singapore) as well as by the High Commission of India, Singapore and the entire process adopted was in a strict compliance with the chain of authentication for overseas document as stipulated in the Notaries Public Manual, Singapore and it is in this contextual background, it was held that the requirement of Section 85 of the Evidence Act, stood satisfied and

therefore, the presumption was attracted, which admittedly, is not the case, in the present matter, as discussed above.

35. Thus, the complaint itself filed by the complainant, suffered from an inherent infirmity as it was not filed by a person duly authorized to do so, in absence of any presumption being available with the donee under Section 85 of the Evidence Act due to lack of authentication and the donee not being a witness to the said power-of-attorney. This however, was a defect which could have cured by subsequent ratification, as held in *Jugraj Singh* (supra) as the same is permissible under law, however, the subsequent power-of-attorney at Exh. 23 (page 50) dated 18/05/2010 does not contain any clause ratifying the action done by the attorney/donee, under the previous power-of-attorney dated 03/06/2009 at Exh. 54, apart from which, the subsequent power-of-attorney at Exh.23 also suffers from absence of authentication, as a result of which, the presumption under Section 85 of the Evidence Act was also not available in respect of the same, too.

36. Though Mr. Salunkhe, learned Counsel for the respondent relies upon ***K. A. Pradeep*** (supra), the same is of no assistance to the learned Counsel, for the reason that in para 7 thereof, the Court has held that though the endorsement made by the Notary Public on the power-of-attorney in question was unsatisfactory, it could not be said that it was not a document which purports to be a power-of-attorney executed and authenticated by a Notary Public. Similarly, reliance upon ***Taraben*** (supra) also is of no assistance as it was a case relating to nature of powers granted upon the mother by her daughter rather than a case involving the presumption under Section 85 of the Evidence Act. ***M/s TRL Krosaki Refractories Ltd.*** (supra), is also besides the point, as Section 85 of the Evidence Act did not fall for consideration and the question was only whether a complaint filed by a Company under Section 138 of the Negotiable Instruments Act through a power-of-attorney, was capable of being taken cognizance under Section 142(1)(a) of the Negotiable Instruments Act. In ***A. C. Narayanan Vs. State of Maharashtra and others, (2014) 11 SCC 809***, it was held that filing a complaint under Section 138 of the Negotiable Instruments Act through a power-of-attorney having due knowledge about the transaction in question

was perfectly legal and competent, however, the question of presumption under Section 85 of the Evidence Act did not fall for consideration therein.

37. Taking cognizance of and continuation of proceedings are two different things in as much, though at the institution of a complaint for taking cognizance, *prima facie* satisfaction of the requirements of the law would be enough, however, further prosecution and decision on merits, would require that the rigor of law applicable thereto are to be strictly complied with. The leeway which is available at the stage of cognizance is not available when the matter is to be decided on merits by trial, which may result in the conviction of an accused.

38. In ***Sagayadurai*** (supra) relied upon by Mr. Salunkhe, learned Counsel for the respondent, it has been held that in case of a firm, a complaint by a manager representing a firm who was well connected with the affairs of the partnership firm was competent, even in absence of a special permission or authorization from the firm. However, it would be material to note that neither Section 18

of the Indian Partnership Act nor Section 19 thereof, which define the nature and extent of the authority of the partner of a firm has been considered. It is material to note that when Sections 18 and 19 of the Indian Partnership Act, place restriction upon the authority of a partner as contemplated therein, any authority claimed by third person maybe an employee of the said partnership firm, cannot be presumed but has to be specific and to the satisfaction of the Court so as to make any decision rendered in the proceeding, binding upon the firm and its partners. In the instant matter, admittedly, there is no such authority produced by the partners of the firm, except for the above two power-of-attorneys at Exh. 54 and Exh. 23, both of which are not authenticated and since the complaint has been instituted basically on the strength of the above power-of-attorney at Exh.54, it would not be permissible, for the respondent to set up a new case, which has not being pleaded and established before the learned Judicial Magistrate First Class. Nor is there anything placed on record to indicate that the said attorney was working as the recovery officer of the complainant.

39. It is thus apparent that, the complaint as filed by the respondent itself was not maintainable in view of what has been discussed above.

40. Even otherwise, both the Courts failed to appreciate that the order form as well as the invoices (Exhs.27, 28, 33, 34, 39, 40, 45 and 46) were documents which were not in the name of the applicant but in the name of the alleged customers whose advertisements are claimed to have been published. In order to bind the applicant, the transaction ought to have been established, which, in turn would mean that the order form or the invoice ought to have been raised in the name of the applicant and not in the name of any third person. Even the order form and the invoices, do not indicate that any advertisement is being published at the behest of the applicant, which would indicate absence of any contractual obligation between the applicant and the respondent in the matter of publication of the advertisement. Mere mention of the name of the applicant at the bottom of the advertisement published is neither here nor there as that does not point out to any contractual obligation between the applicant and the respondent in publishing

the same in absence of anything else. There is one other factor, which militates against the plea of legal debt or the liability, which is the evidence of Mahesh Prasad Gokulchandra Sarangi, the alleged power-of-attorney, who, in his affidavit evidence in para 2 says that the accused was entitled for 15% commission on gross billing after realization of payment, which being the position, in the normal set of events, the cheque ought to have been of the entire amount and it is only on the encashment of the same that the commission of 15% could have flown back to the applicant, which is not the case at all. Thus, the case pleaded by the aforesaid attorney in his affidavit-evidence is contradictory to the fact emerging on record, as the order form and the invoice both of which are not in the name of the applicant, speak otherwise.

41. The contention of Mr. Gaikwad, learned Counsel of the applicant that the advertisements published (pg. 56, 60, 64 and 68) were contrary to the size as given in the order form and the invoice which indicated size of 10 cm to 2 cm, whereas the advertisement published is 10 cm X 8 cm would also indicate the contradiction between the claim made by the complainant on the basis of the

order and invoice and the advertisement published, as against which, the cross-examination of PW-1 indicates that the advertisement published was of size 10 cm X 12 cm (pg. 20 para 3) instead of 10 cm X 2 cm, as contained in the order form and the invoice, which discrepancy has also not been explained.

42. The above conspectus of facts, would indicate that the plea put forth that the complaint was not only infirm as it was not presented by a person legally competent to do so, on account of absence of the availability of presumption under Section 85 of the Evidence Act, but even otherwise, on the merits of the matter, was fraught with contradictions, which have not been explained. True it is that there is a presumption available to the complainant, however, the same is not absolute but is rebuttable. The rebuttal can be either by way of leading defence evidence or bringing out relevant material by way of cross-examination, or on failure of the complainant to explain the circumstances in which the cheques fell into its hands, or to satisfy the requirements of law in that regard. All these factors, unfortunately have gone unnoticed by the Courts below which has resulted in miscarriage of justice, as even on merits it has been

brought on record that there was no credibility with the plea put forth by the complainant for having the custody and consequent entitlement to the cheques in question due to which the presumption stood rebutted.

43. Though there are concurrent findings rendered by the Courts below, in view of the discussion as made above, I am constrained to interfere in the judgments. Resultantly, the criminal revision application is allowed and both the judgment and sentence awarded by the learned Judicial Magistrate, First Class by its judgment dated 07/05/2013 and the judgment of the learned Sessions Court dated 07/07/2021 confirming the conviction are hereby quashed and set aside and the complaint filed by the complainant is dismissed. The applicant stands acquitted of the offence punishable under Section 138 of the Negotiable Instruments Act. The fine amount deposited by the applicant be refunded back to the applicant.

Rule is made absolute in the aforesaid terms.
Considering the circumstances, there shall be no order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar