

(2015) 01 SC CK 0123

In the Supreme Court Of India

Case No : Criminal Appeal Nos. 73 of 2007 and 1437 of 2013

A.C. Narayanan and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2
Criminal Procedure Code, 1973 (CrPC) — Section 200, 204, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 142, 145

Citation : (2015) 2 ACR 1407 : (2015) 2 AD (SC) 153 : AIR 2015 SC 1198 :
(2015) 1 ALD(Cri) 1031 : (2015) 88 ALLCC 903 : (2015) ALLMR(Cri) 781 :
(2015) 2 ALT(Cri) 43 : (2015) 1 BomCR(Cri) 655 : (2015) 1 CCR 347 : (2015)
125 CLA 159 : (2015) CriLJ 1434 : (2015) 1 Cri

Hon'ble Judges : Sharad Arvind Bobde, J.;Sudhansu Jyoti Mukhopadhaya, J.

Bench : Division Bench

Advocate : Indu Malhotra, Senior Advocate, Vivek Jain, Nishtha Kumar, Varun Singh, Vikas Mehta, Annam D.N. Rao, S. Sircar, Vaishali R., Annam Venkatesh, Himanshu Gupta, Niraj Sharma, Anil Kumar Tandale, A.P. Mayee, Charudutta Mahindrakar and A. Selvin Raja, for the

Final Decision : Allowed

Judgement

Sudhansu Jyoti Mukhopadhaya, J.—As the question of law involved is common in both the appeals, they are heard together and disposed of by this common judgment.

Criminal Appeal No. 73 of 2007

2. Brief facts of the case are as follows:

The accused?Appellant, A.C. Narayanan challenged the common order dated 29th November, 2000 passed by the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai (hereinafter referred to as the, ?Trial Court?) by filing applications Under Section 482 of the Code of Criminal Procedure, 1973 before the High Court. By the said common order the applications preferred by the

Appellant-A.C. Narayanan for discharge/recalling process against him was rejected by the Trial Court. The High Court by impugned judgment dated 12th August, 2005, dismissed the applications preferred by the Appellant and upheld the order passed by the Trial Court. 3. The Appellant is the Vice-Chairman and Managing Director of the Company M/s. Harvest Financials Ltd. (hereinafter referred to as the "Company") having its registered office at Bombay. Under a scheme of investment, the Appellant collected various amounts from various persons in the form of loans and in consideration thereof issued post-dated cheques either in his personal capacity or as the signatory of the Company which got dishonoured.

4. Respondent No. 2-Mrs. Doreen Shaikh is the power of attorney holder of six complainants, namely Mr. Yunus A. Cementwalla, Smt. Fay Pinto, Mr. Mary Knoll Drego, Smt. Evelyn Drego, Mr. Shaikh Anwar Karim Bux and Smt. Gwen Piedade. On 16th December, 1997, Respondent No. 2 on behalf of the six complainants filed Complaint Case Nos. 292/S/1998, 293/S/1998, 297/S/1998, 298/S/1998, 299/S/1998 and 300/S/1998 respectively against the Appellant herein Under Sections 138 and 142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the, "N.I. Act") before the Trial Court. The said Respondent No. 2 verified the complaint in each of those cases as Power of Attorney Holder of the complainants. The Additional Chief Metropolitan Magistrate vide order dated 04th April, 1998 issued process against the Appellant Under Section 204 of the Code of Criminal Procedure for the offences punishable Under Sections 138 and 142 of the N.I. Act.

5. The Appellant, being aggrieved moved an application for discharge/recall of process in each of the complaints. The Trial Court vide common order dated 29th November, 2000 dismissed the applications filed by the Appellant.

6. The Appellant being aggrieved preferred applications being Criminal Application Nos. 797, 798, 799, 801, 802 and 803 of 2002 before the High Court for calling for the records of the case pending in the Trial Court. By impugned order dated 12th August, 2005 the said applications were dismissed by the High Court.

Criminal Appeal No. 1437 of 2013

7. The brief facts of the case is as follows:

This appeal has been preferred by the accused-G. Kamalakar against the judgment and order dated 19th September, 2007 passed by the High Court of Judicature, Andhra Pradesh of Hyderabad in Criminal Appeal No. 578 of 2002. By the impugned judgment, the High Court allowed the appeal preferred by the 1st Respondent- M/s. Surana Securities Ltd. (hereinafter referred to as the "Company") set aside the judgment of acquittal dated 30th October, 2001 passed by the XVIII Metropolitan Magistrate, Hyderabad in CC No. 18 of 2000 convicted the Appellant Under Section 138 of the N.I. Act and sentenced the Appellant to pay a fine of Rs. 6,10,000/-, out of which an amount of Rs. 6,00,000/- was to be

paid to the complainant towards compensation and in default to suffer simple imprisonment for a period of one month. 8. The 1st Respondent- M/s. Surana Securities Ltd. is the complainant and is a limited Company carrying on business of trading in shares. The Appellant-G. Kamalakar is the client of the 1st Respondent-Company and used to trade in shares. During the course of business, the Appellant-G. Kamalakar became liable to pay an amount of Rs. 7,21,174/- towards the Respondent-Company. In order to discharge the said liability, the Appellant issued six cheques amounting to Rs. 1,00,000/- each and another cheque for Rs. 1,21,174/- of different dates. When first six cheques were presented for encashment on 18th September, 1997, the same got dishonoured with an endorsement "funds insufficient". Upon receiving such information, the Company issued a legal notice to the Appellant to pay the amount but the same was not paid by the Appellant.

9. The Board of Directors of the 1st Respondent-Company, by a resolution authorized its Managing Director to appoint an agent to represent the Company. Pursuant thereto, one Shri V. Shankar Prasad was appointed as an agent by executing a General Power of Attorney. Later, he was substituted by one Shri Ravinder Singh under another General Power of Attorney. The Respondent-Company filed a complaint Under Section 138 of the N.I. Act being CC No. 1098 of 1997 in the Court of XIth Metropolitan Magistrate, Secunderabad. The complaint was transferred to the Court of XVIIIth Metropolitan Magistrate, Hyderabad by order dated 3rd May, 2000 and was registered as CC No. 18 of 2000. By judgment dated 30th October, 2001, the Metropolitan Magistrate dismissed the complaint filed by the Respondent-Company Under Section 138 of the N.I. Act.

10. Aggrieved by the said order, Respondent-Company filed an appeal being Criminal No. 578 of 2002 before the High Court of Judicature, Andhra Pradesh at Hyderabad. By the impugned judgment dated 19th September, 2007, the High Court allowed the appeal, set aside the judgment dated 30th October, 2001 passed by the XVIIIth Metropolitan Magistrate, Hyderabad and convicted the Appellant Under Section 138 of the N.I. Act. Against the aforesaid order of conviction, the present appeal has been preferred.

11. On 4th January, 2007, in view of the difference of opinion among various High courts as also decisions of this Court in M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, and Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, referred the matter to larger bench. The entire order of reference reads as under:

Delay in filing counter affidavit is condoned.

Leave granted.

Interpretation and/or application of Section 142(a) of the Negotiable Instruments Act, 1881, ("NI Act") is in question in this appeal which arises out of a judgment and order dated 12.8.2005 passed by a learned Single Judge of the High Court of

Judicature at Bombay.

The basis fact of the matter is not in dispute.

Several cheques on different dates were issued by the applicant herein which were dishonoured. The complaint petitions in the Court of Additional Chief Metropolitan Magistrate, Bandra, Mumbai. The complaint petitions were filed in the name of the respective payees of the cheques. She also filed affidavits in support of the averments made in the said complaint petitions. Cognizance of offence Under Section 138 of the N.I. Act was taken against the Appellant. Summons were issued. Questioning the order issuing summons by the learned Magistrate in exercise of his power Under Section 204 of the Code of Criminal Procedure, Appellant herein filed criminal application before the High Court of Judicature at Bombay, inter alia, contending that the complaint petitions filed by the Power of Attorney Holder was not maintainable and relying thereupon or on the basis thereof the learned Magistrate could not have issued summons. The said contention has been negative by the High Court in its impugned judgment.

In the aforementioned premises interpretation of Section 142(a) of the N.I. Act comes up for consideration before us. We may notice that in M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, , a Division Bench of this Court has opined.:

This Court has, as far back as, in the case of Vishwa Mitter of Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot Vs. O.P. Poddar and Others, held that it is clear that anyone can set the Criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by the payee or the holder in due course. This criteria is satisfied as the complaint is in the name and on behalf of the Appellant Company

However, in a later judgment in Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, , albeit in a different context, another Division Bench of this Court overruled the judgment of the Bombay High Court in Dr. Pradeep Mohanbay Vs. Minguel Carlos Dias, , inter alia opining as follows:

Order 3 Rules 1 and 2 Code of Civil Procedure empowers the holder of power of attorney to ?act? on behalf of the principal. In our view the word ?acts? employed in Order 3 Rules 1 and 2 Code of Civil Procedure confines only to in respect of ?acts? done by the power-of-attorney holder in exercise of power granted by the instrument. The term ?acts? would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some ?acts? in pursuance of power of attorney, he may depose for the

principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal is entitled to be cross-examined.

on the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri Vs. State of Rajasthan and Others, 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 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.

However, in the case of Humberto Luis v. Gloriano Armado Luis [(2002) 2 Bom. CR 754) 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 Code of Civil Procedure cannot be construed to disentitle 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 Code of Civil Procedure takes within its sweep 'depose'. We are unable to agree with this view taken by the Bombay High Court in Floriano Armando.

It is not in dispute that there is a conflict of opinion on this issue amongst various High Courts, including the decision of Bombay High Court in Mamatadevi Prafullakumar Bhansali Vs. Pushpadevi Kailashkumar Agrawal and Another, on the one hand and a decision of the Andhra Pradesh High Court in S.P. Sampathy Vs. Smt. Manju Gupta and Another, , on the other. One of the questions which would arise for consideration is as to whether the eligibility criteria prescribed by Section 142(a) of the 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 and/or whether a complaint petition has to be presented before the Court by the payee or the holder of the cheque himself.

Another issue which would arise for consideration is as to whether the payee must examine himself in support of the complaint petition keeping in view the insertion of Section 145 of the Said Act (Act No. 55 of 2002).

In our opinion, in view of difference of opinion amongst various High Courts as also the decisions of this Court in M.M.T.C. Ltd. (Supra) and Janki Vashdeo Bhojwani (supra), particularly in view of the fact that in the later case the earlier one was not noticed, an authoritative pronouncement is necessary to be given in this regard. We, therefore, are of the opinion that the matter should be considered by a larger Bench.

12. The matter was considered by a larger Bench of three Judges. By judgment dated 13th September, 2013 reported in A.C. Narayanan Vs. State of Maharashtra and Another, the said larger Bench framed the following questions:

(i) Whether a Power of Attorney holder can sign and file a complaint petition 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 varied 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?

13. The first question relating to the eligibility of Power of Attorney holder to sign and file a complaint petition on behalf of the complainants and whether eligibility criteria prescribed by Section 142(a) of N.I. Act is satisfied, if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque, was answered by larger Bench in affirmative by its judgment in A.C. Narayanan Vs. State of Maharashtra and Another, with observation, which reads as follows:

19) As noticed hereinabove, though Janki Vashdeo Bhojwani (supra), relates to powers of Power of Attorney holder under Code of Civil Procedure 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 and Another, . 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 21 Page 22 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.

14. The second question relating to verification of Power of Attorney holder on oath as prescribed Under Section 200 of the Code was answered as follows:

20) The stand of the Appellant in Criminal Appeal No. 73 of 2007 is that no complaint can be filed and no cognizance of the complaint can be taken if the complaint is by the power of attorney holder, since it is against Section 200 of the Code and deserves to be rejected. There is no dispute that complaint has to be filed by the complainant as contemplated by Section 200 of the Code, but the said Section does not create any embargo that the attorney holder or legal representative(s) cannot be a complainant.

22) From a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process Under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint Under Section 138 of the N.I. Act. For the purpose of issuing process Under Section 200 of the Code, 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. It is only if and where the Magistrate, after considering the complaint Under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint Under Section 138 of the 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.

15. While holding that there is no serious conflict between the decisions in "MMTC (supra) and Janki Vashdeo Bhojwani (supra)", the larger Bench clarified the position and answered the questions framed 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.

Case of A.C. Narayanan

16. In this case Magistrate had taken cognizance of the complaint without prima facie establishing the fact as to whether the Power of Attorney existed in first place and whether it was in order. It is not in dispute that the complaint against the Appellant was not preferred by the payee or the holder in due course and the statement on oath of the person who filed the complaint has also not stated that he filed the complaint having been instructed by the payee or holder in due course of the cheque. Since the complaint was not filed abiding with the provisions of the Act, it was not open to the Magistrate to take cognizance.

17. From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint. Further, in the list of evidence there is just a mere mention of the words at serial No. 6 viz. "Power of Attorney", however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the Respondent No. 2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20th February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process.

18. The Appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the Respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the Appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12th August, 2005.

19. In the result, the impugned judgment dated 12th August, 2005 passed by the High Court of Judicature at Bombay and the order dated 29th November, 2000 passed by the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai are set aside and the proceedings in question against the Appellant are quashed.

Case of G. Kamalakar

20. In this case it is not in dispute that the complaint was filed by one Shri V. Shankar Prasad claiming to be General Power of Attorney of the complainant company. Subsequently PW-1 Shri Ravinder Singh gave the evidence on behalf of the Company under the General Power of Attorney given by the complainant Company. The complaint was not signed either by Managing Director or Director of the Company. It is also not in dispute that PW-1 is only the employee of the Company. As per Resolution of the Company i.e. Ex. P3 under first part Managing Director and Director are authorized to file suits and criminal complaints against the debtors for recovery of money and for prosecution. Under third part of the said Resolution they were authorized to appoint or nominate any other person to appear on their behalf in the Court and engage lawyer etc. But nothing on the record suggest that an employee is empowered to file the complaint on behalf of the Company. This apart, Managing Director and Director are authorized persons of the Company to file the complaint by signing and by giving evidence. At best the said persons can nominate any person to represent themselves or the Company before the Court. In the present case one Shri Shankar Prasad employee of the Company signed the complaint and the Deputy General Manager of the Company i.e. PW-1 gave evidence as if he knows everything though he does not know anything. There is nothing on the record to suggest that he was authorized by the Managing Director or any Director. Therefore, Magistrate by judgment dated 30th October, 2001 rightly acquitted the Appellant. In such a situation, the case of the Appellant is fully covered by decision by the larger bench of this Court passed in the present appeal. We have no other option but to set aside the impugned judgment dated 19th September, 2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 578 of 2002. The judgment and order dated 30th October, 2001 passed by the Court of XVIII Metropolitan Magistrate, Hyderabad in C.C. No. 18 of 2000 is upheld.

21. The appeals are allowed accordingly.