

(2000) 03 KL CK 0052

In the High Court Of Kerala

Case No : Criminal M.C. No's. 2719 and 3383 of 1999

S.G. Pandalai

APPELLANT

Vs

Jacob C. Alexander and Another and State of Kerala and
Another

RESPONDENT

Date of Decision : 01-03-2000

Acts Referred:

Advocates Act, 1961 — Section 30

Negotiable Instruments Act, 1881 (NI) — Section 138, 142, 26, 27

Citation : (2000) 2 CivCC 542 : (2002) 108 CompCas 841 : (2000) CriLJ 2155 :
(2000) 2 ILR (Ker) 650 : (2000) 2 RCR(Criminal) 480

Hon'ble Judges : K.A. Mohamed Shafi, J

Bench : Single Bench

Advocate : Dale P. Kurian, in Criminal M.C. No. 3383 of 1999, C. Kochunni Nair and Dale P. Kurian, in Criminal M.C. No. 2719 of 1999, for the Appellant; Noble Mathew, in Crl. M.C. No. 2719 of 1999 and Respondent No. 2 in Crl. M.C. No. 3383 of 1999 and K.V. Sohan, in Crl. M.C. No. 2719 of 1999, for the Respondent

Judgement

K.A. Mohamed Shafi, J.—These M. Cs. are filed by the accused in C. C. Nos. 464 of 1998 and 376 of 1999 pending before the Judicial First Class Magistrate's Court-V, Thiruvananthapuram and Chief Judicial Magistrate's Court, Thiruvananthapuram, respectively, to quash the entire proceedings u/s 482 of the Criminal Procedure Code, 1973.

2. On the basis of annexure B complaints filed by the complainant, who is the second respondent in Crl. M. C. No. 2719 of 1999 and the first respondent in Crl. M. C. No. 3383 of 1999, the petitioner is standing trial for the offence punishable u/s 138 of the Negotiable Instruments Act before the Judicial First Class Magistrate's Court-V, Thiruvananthapuram and Chief Judicial Magistrate's Court, Thiruvananthapuram, respectively. Annexure A is the copy of the notice sent by the complainant intimating the petitioner about the dishonour of the cheques and calling upon him to pay the amount.

3. The petitioner has contended that annexure A notice sent on behalf of the drawee of the cheque is not in conformity with proviso (b) to Section 138 of the Negotiable Instruments Act, that annexure B complaint does not disclose the ingredients of the offence punishable u/s 138 of the Negotiable Instruments Act and that the notice is issued not as per the instructions given by the payee or the holder in due course as stipulated in proviso (b) to Section 138 of the Negotiable Instruments Act and is issued as per the instructions given by the power of attorney holder of the payee of the cheque and, therefore, the notice is invalid in law.

Proviso (b) to Section 138 of the Negotiable Instruments Act stipulates that the payee or the holder in due course of the cheque, as the case may be, should make a demand for the payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. In this case there is no contention that annexure A notice is not sent within 15 days of the receipt of information from the bank regarding the dishonour of the cheque. No particular form of notice is prescribed under proviso (b) to Section 138 of the Negotiable Instruments Act. It only stipulates that a notice in writing should be given to the drawer of the cheque within 15 days of the receipt of information from the bank regarding the return of the cheque unpaid, demanding payment. It is the statutory duty of the drawer to pay the amount within 15 days of the receipt of notice under proviso (c) to Section 138 of the Negotiable Instruments Act. In annexure A notice the drawer of the cheque, the petitioner herein is called upon to pay the cheque amount within 15 days from the date of receipt of the notice. Therefore, annexure A notice is perfectly in compliance with proviso (b) to Section 138 of the Negotiable Instruments Act. Therefore, this contention raised by the petitioner is absolutely unsustainable.

4. The next contention raised by the petitioner is that annexure A notice is issued not by the payee or the holder in due course as stipulated in proviso (b) to Section 138 of the Negotiable Instruments Act and it is issued by the advocate on instructions given by the power of attorney holder of the payee of the cheque. Therefore, according to the petitioner, annexure A notice is illegal and invalid since under proviso (b) to Section 138 of the Negotiable Instruments Act it is incumbent upon the drawee or the holder in due course, as the case may be, to issue notice, and the power of attorney holder of the payee is incompetent to issue notice under proviso (b) to Section 138 of the Negotiable Instruments Act.

5. In support of this contention counsel for the petitioner relies upon the decision in *T.C. Mathai and Another Vs. The District and Sessions Judge, Thiruvananthapuram, Kerala*, wherein it has been held that under the Criminal Procedure Code the appearance of the accused cannot be made through a power of attorney holder and an agent cannot become a pleader for the party in criminal proceedings unless the party secures permission from the court to appoint him to act in such proceedings.

6. The above decision has absolutely no application to the facts of this case. In this case the power of attorney holder as the agent of the payee has given instructions to the advocate to issue the registered notice and file the complaint before the court u/s 142 of the Negotiable Instruments Act on behalf of his principal. He has not acted or pleaded for his principal and the petitioner has no such case also. Section 27 of the Negotiable Instruments Act empowers agency by a person who is competent to make, draw, accept, endorse, deliver and negotiate a promissory note, bill of exchange or cheque u/s 26 of the Negotiable Instruments Act. Therefore, the power of attorney holder of the payee is entitled to act on behalf of the payee u/s 27 of the Negotiable Instruments Act with the only limitation that he can accept or endorse a bill of exchange only with the specific agency in that behalf. Therefore, the contention of the petitioner that the notice issued in this case is invalid since the instruction to issue the notice is not given by the payee himself but given by his power of attorney holder, is not at all sustainable.

7. The judgment passed by a single judge of this court in P.K. Koya Moideen v. G. Hariharan [1996] 86 Comp Cas 399(HR) : [1996] 1 KLT 389 holding that the executor of the will cannot be treated as the holder in due course and he cannot file a complaint u/s 138 of the Negotiable Instruments Act unless there is an averment in the complaint that he had paid consideration to the deceased and thereby he became the holder in due course, cannot be followed as it is per incuriam of Section 27 of the Negotiable Instruments Act and Section 306 of the Indian Succession Act since Section 27 of the Negotiable Instruments Act empowers agency and Section 306 of the Indian Succession Act provides that demands and rights of action of or against the deceased survive to and against the executor or administrator, except those causes of action which are expressly mentioned in that section as it will not survive to and against the executor or administrator. Therefore, the contention of the petitioner based on the above decision is not sustainable.

8. The argument advanced by counsel for the petitioner that Section 27 of the Negotiable Instruments Act is applicable only with regard to civil liability and Section 138 of the Act being a special offence specifically created by amendment of the Negotiable Instruments Act very recently, in order to attract the criminal liability u/s 138 of the Negotiable Instruments Act, the ingredients of Section 138 of the Negotiable Instruments Act should be satisfied, is also not sustainable, since it is clear from the Negotiable Instruments Act that the provisions of Section 27 of the Negotiable Instruments Act are applicable to civil as well as criminal liabilities under the Act.

9. The further contention raised by the petitioner is that the power of attorney holder being the agent of the principal cannot further delegate the power delegated to him by the principal and, therefore, the notice issued by the advocate on the instruction given by the power of attorney holder is illegal and invalid, is also absolutely unsustainable. The power of attorney holder has only

given instructions to counsel to send the registered notice and to prepare the complaint as the agent of the principal. The advocate has issued the notice and preferred the complaint before the court not as agent of the person who gave instructions to send the notice or prepare the complaint, but as a pleader of that person as empowered u/s 30 of the Advocates Act. Therefore, in giving instructions to the advocate to send the registered notice and to prepare the complaint by the power of attorney holder as the agent of his principal, there is no question of further delegation of the power delegated to him by his principal as per the power of attorney executed in his favour.

10. The contention of the petition is that the transaction by which the cheques are alleged to have been issued by the petitioner to the complainant attracting the provisions of Section 138 of the Negotiable Instruments Act is very personal in nature and the principal himself alone and not the power of attorney holder can disclose or explain the same. Therefore, the subject-matter being very personal to the knowledge of the drawee, he himself should give instructions to send the registered notice and to prepare the complaint u/s 138 of the Negotiable Instruments Act.

11. It is true that with regard to the matters which are in the special or personal knowledge of the principal, he himself has to disclose that fact before the court and his power of attorney is incompetent to state anything before the court regarding those matters. But what are the matters in the special or personal knowledge of the principal which he alone can disclose before the court and not by his power of attorney are matters to be decided by the court. Giving instructions to send the registered notice or to prefer a suit or complaint or other proceedings on behalf of his principal cannot be construed as matters which are in the special or personal knowledge of the principal which cannot be disclosed by his power of attorney.

12. Section 138 or 142 of the Negotiable Instruments Act does not contain a similar provision as in Section 198 or 199 of the Criminal Procedure Code debarring the court from taking cognizance of certain offences except upon a complaint made by some person aggrieved by the offence concerned. Section 142 of the Negotiable Instruments Act only lays down that cognizance of the offence punishable u/s 138 can be taken by a court only upon a complaint in writing made by the payee or as the case may be, the holder in due course of the cheque, notwithstanding anything contained in the Criminal Procedure Code.

13. In the decision in C.B.S. Gramophone Records and Tapes (India) Ltd. Vs. P.A. Noorudeen, a single judge of this court has held that a complaint filed by the authorised representative of a company u/s 142 of the Negotiable Instruments Act is maintainable.

14. In the decision in Hamsa Vs. Ibrahim, a single judge of this court has held that a power of attorney of a payee or holder in due course can make a complaint u/s 142 of the Negotiable Instruments Act.

15. I am in respectful agreement with the view expressed by this court in the above judgments. Therefore, the contention of the petitioner that instruction to send the notice under the proviso (b) to Section 138 of the Negotiable Instruments Act and to prepare the complaint u/s 142 of the Negotiable Instruments Act should have been given by the drawee himself and, therefore, the entire proceedings initiated against the petitioner alleging offence punishable u/s 138 of the Negotiable Instruments Act is illegal and the same is liable to be quashed u/s 482 of the Criminal Procedure Code is not sustainable. The question whether any fact is within the special or personal knowledge of the drawee or holder in due course, as the case may be, and the power of attorney holder cannot depose before the court regarding those aspects and, therefore, the principal himself should give evidence regarding those aspects are matters to be considered by the trial court at the stage of evidence. Therefore, I find absolutely no ground to quash the criminal proceedings launched against the petitioner alleging offence punishable u/s 138 of the Negotiable Instruments Act in these cases.

Therefore, the Crl. M. Cs. are dismissed.