

**(2015) 02 KAR CK 0307**  
**In the Karnataka High Court**  
**Case No : Criminal Appeal No. 2722/2009**

Shriram Transport Finance Co. Ltd.

APPELLANT

Vs

Akhilabanu

RESPONDENT

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**Date of Decision :** 11-02-2015

**Acts Referred:**

Negotiable Instruments Act, 1881 (NI) — Section 138, 142(1), 145

**Citation :** (2015) 2 AKR 483 : (2015) 3 KCCR 2578

**Hon'ble Judges :** Rathnakala, J.

**Bench :** Single Bench

**Advocate :** Vinod S. Pawar, for the Appellant; Vijay Malali, Advocate for Hegde Neeralagi and Patil, Advocates for the Respondent

**Final Decision :** Dismissed

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## Judgement

Rathnakala, J.—This appeal is filed assailing the judgment of acquittal recorded by the learned Magistrate in dismissing the complaint filed the complainant in respect of offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I. Act" for brevity) thereby acquitting the respondent - accused.

2. Facts succinctly stated, the complainant Sriram Transport Finance Company Limited filed a private complaint through its General Power of Attorney holder against the accused alleging the offence punishable under Section 138 of N.I. Act. The allegation was, the accused being a customer of the Company availed loan from the Company to purchase Tata Tipper vehicle for a total hire purchase value of Rs. 2,95,000.50 ps. By executing a hire purchase agreement with related documents in favour of the Company. She defaulted and became due to the Company for a sum of Rs. 60,000/- despite several demands she did not repay the said amount. Finally she paid one account payee cheque bearing No. 4796893 dated 27.09.2007 drawn on Bank of India, Hospet Branch for Rs. 60,000/-. When the cheque was presented for encashment, it was returned with an endorsement "Funds insufficient". The complainant informed the said fact to

the accused by way of demand notice and called upon her to repay the amount within fifteen days, from the date of receipt of the notice, the notice is served through certificate of posting, she refused the notice sent through R.P.A.D., she neither did reply nor did comply the demand, she has issued cheque knowing that there is insufficient funds in her account thereby committed offence under Section 138 of N.I. Act.

3. On receipt of the complaint, the learned Magistrate took cognizance, recorded the sworn statement of the G.P.A. holder, being satisfied with the merits in the complainant's case ordered to register the criminal case, and procured the, the accused. She pleaded not guilty to the substance of accusation read over to her by the Court. The G.P.A. holder of the complainant was examined as P.W. 1, 13 documents were marked as Exs. P-1 to P-13. After closure of the complainant's evidence, the accused was examined under Section 313 statement, she denied all the incriminating circumstances appearing in the evidence of P.W. 1, but did not lead evidence.

4. The learned Court after giving audience to both dismissed the complaint, mainly on the ground that the vehicle was the subject of hire purchase agreement, is seized under hypothecation agreement: the complainant cannot invoke Section 138 of N.I. Act and the witness P.W. 1 had not produced original authorization letter in favour of the Director, who authorised him to file the complaint, hence the complaint is not maintainable.

5. Learned counsel for the appellant Sri Vinod S. Pawar, submits that the demand notice was refused by the accused; though she was served by the Certificate of Posting, she has not replied to the notice. Her signature on the cheque and also the fact that the cheque is issued from her account is not disputed by her. Admittedly, she has issued the cheque towards the outstanding loan availed while purchasing the vehicle. Of course, on her failure to repay the amount, the vehicle was seized and she has issued the cheque for Rs. 60,000/- towards difference of outstanding loan amount. There is no bar to invoke the N.I. Act, despite availability of a civil remedy. The trial Court gave undue weight to the fact that original G.P.A. is not produced, but the complainant - Company being a non-banking public limited finance institution engaged in vehicle finance business, prosecuting similar complaints in various courts cannot produce original G.P.A. in each and every case: hence, they were obliged to produce the notarized copy of G.P.A. The veracity of G.P.A. was not an issue between the parties, neither the Court nor the accused called upon the Company to produce the original G.P.A. Under the circumstances, the trial Court ought to have convicted the accused for the offence under Section 138 of N.I. Act.

6. The reply submission of the learned counsel Sri Vijay Malali, for the accused is, the hire purchase agreement came to an end the moment the vehicle was seized. Further, the accused was not informed about the sale of the vehicle, if so, to what sale price it was sold. It was a post-dated cheque filled up at a later point of time. No notice is issued to her for repayment of the outstanding debt.

The bye-law of the Company is not produced to establish that Board of Director can authorise the Managing Director in turn, said Managing Director can authorise the G.P.A. holder to present the complaint under Section 138 of N.I. Act or to adduce evidence as a witness in the complaint case. The reasoning assigned by Court below for dismissal of complaint is based on sound reasoning and is in accordance with the well established legal position and the appeal is liable to be rejected.

7. In the light of the above submissions, the point that arises for my consideration are:-

- i) Whether the complaint was properly presented and prosecuted?
- ii) Whether the accused issued the cheque towards "legally enforceable debt or liability"?

8. The complaint was presented before the learned Magistrate by one I.B. Venkatesh, the Legal Consultant and Power of Attorney Holder of the company. But, the evidence was adduced by one G. Krishnamurthy, Field Executive and Power of Attorney Holder of the complainant of the branch office of Hospet. Among other things PW 1 produced Ex. P8-the G.P.A. executed in his favour by the Managing Director and the resolution of the company as Ex. P12, authorization given to Managing Director to appoint G.P.A. While the G.P.A., at Cl. 8, authorises the attorney,

"To give evidence before any Court, Forum, Tribunals and Quasi Judicial authorities, to sign, declare and verify Affidavit of proof for and on behalf of the Company:

Ex. P12-the extract of the minutes of the meeting of the Board of Directors held on 30/10/2000 reads as under:-

#### "ISSUE OF GENERAL POWER OF ATTORNEY

A draft Power of Attorney proposed to be issued to Sri R. Srihdar, Managing Director, duly initialed by the Chairman for the purpose of identification, was tabled. It was

"RESOLVED THAT subject to the overall limit available to the Board, a general Power of Attorney be issued to Sri R. Sridhar, Managing Director to perform various activities on behalf of the Company.

RESOLVED FURTHER THAT Sri R. Sridhar, Managing Director be and is hereby authorized to issue limited Power of Attorney in favour of the Executives and Managers in charge of the branches in matters relating to the operations of the company."

9. Learned Magistrate non suited the complainant for more than one reason i.e. complaint not disclosing the specific amount due by the accused to the complainant, PW-1"s ignorance about the amount for which vehicle was sold (in

fact there was no such expression in the cross examination evidence of PW-1), non production of GPA executed by the Board of Directors in favour of PW-1 and want of proof of his employment with the complainant's company, non production of original G.P.A. executed in favour of Mr. Venkatesh, who presented the complaint, and in favor of PW 1, and want of documentary proof in respect of replacement of earlier attorney/Venkatesh. Relying on the precedents, the learned Magistrate returns the finding that, since the complainant had exercised its right of seizure of vehicle, the only option left for the complainant was by way of civil suit.

10. In a judgment of this Court reported in *Sarathi Leasing Finance Limited Vs. Sri B. Narayana Shetty*, , relied by the appellant, it is held that in the matter of a complaint, in respect of offence under Section 138 of N.I. Act, on behalf of a Company, authorisation to file the complaint on behalf of the company is not required.

11. Larger Bench of the Apex Court in *A.C. Narayanan Vs. State of Maharashtra and Another*, raised the following questions for consideration:-

i) Whether a Power of Attorney holder can sign and file a complaint petition on behalf of the complainant?/Whether the eligibility criteria prescribed by Section 142(1) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque ?

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

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

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

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

and answered the same as follows:-

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 or 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 persons 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 persons."

12. The Power of Attorney Holder who presented the complaint in his sworn statement did not utter anything as to how he acquired the knowledge about the transaction. Verifying the complainant and swearing to an affidavit in the capacity of legal consultant and Power of Attorney does not necessarily mean that he has witnessed the transaction in due course in the capacity of agent or possess due knowledge of the transaction. In the absence of specific assertion in this regard, in the complaint and his sworn statement placed by way of affidavit, the court is under no obligation to draw favorable presumption about the competency of the deponent of the affidavit. That vitiates the very cognizance taken by the Magistrate and issue of process ordered.

13. The affidavit evidence of the PW-1 who has joined the company subsequent to loan transaction is a mere reiteration of the complaint averments. In the affidavit filed by him as his examination - Chief evidence, it is not shown that the Attorney had witnessed the transaction, as an agent of the payee company in due course or possessed due knowledge regarding the said transaction. If PW-1, in his capacity as an employee of the company had gathered the material information pertaining to this loan transaction, on the basis of the documents maintained in his office, he ought to have stated so and explained under what circumstances the accused had issued the cheque in question. The affidavit evidence lacks such material particulars. That tells upon competency of the attorney to depose as witnesses. Added to that Authority of the Board of Directors to empower the Managing Director as per Ex. P12 is not proved by producing bylaws of the company. In the backdrop of the complaint verification and the affidavit evidence of the witness lacking necessary averments about the personal knowledge of the respective deponent, fail to qualify to the requirements of an Attorney as laid down by the Apex Court in A.C. Narayanan's case, thereby prosecution of the complaint case was vitiated from the very inception.

14. The cheque is issued by the accused in respect of the loan availed by her

husband. The hire purchase loan agreement is not produced in evidence. The copy of the hypothecation agreement deed authorizes the payee for presentation of the postdated cheques issued towards installment payments of the loan amount. That being so, it is clear that the cheque in question was taken as security to the loan amount which had to be paid in installments. Having enforced its liability under the hire purchase agreement by seizure of the vehicle, the company is complicit by producing a leaf of the account extract pertaining to the husband of the accused. PW-1, in his evidence did not disclose anything about the present status of the vehicle. There is no evidence from his side about the actual amount due after the vehicle in question was seized. Basic requirement of offence under Section 138 of the N.I. Act, is, the Cheque ought to have been issued for discharge in whole or in part of any debt or other liability, but that is not established by the complainant.

15. In similar circumstances, the High Court of Kerala in the case of Sudha Beevi Vs. State of Kerala, held that the hire-purchase agreement involved in the case between the financial institution and the hirer stood determined by the act of parties, the cheques which were accepted by the financial institution towards advance for repayment of the hire would become instruments without consideration and that they will be instruments for which consideration had failed and under the said circumstances the remedy available to the financial institution is only to realize the balance hire due by filing appropriate suit for damages on account of breach of terms of agreement. It was also held that since the financial institution had admittedly got repossession of the vehicle and that the said repossession was even before the filing of the complaint case, the hire purchase agreement between the parties stood "determined ipso facto". Thus, as a consequence of the seizure of vehicle the financial institution had exercised one of the options available to him under the agreement and as such the cheques in its hands give as a security thereafter becomes instruments for which consideration had failed and if presented for payment and gets dishonored, no offence punishable under Section 138 of the N.I. Act would be attracted.

16. Above judgment was relied upon by the Madurai Bench of Madras High Court in the case of N. Rajangan Vs. Centurion Bank Ltd., decided on 13.10.2009 The Punjab and Haryana High Court at Chandigarh in the case of M/s. Guru Nanak Tractors Vs. Swam Singh disposed of on 31/7/2013 and the High Court of Chhattisgarh at Bilaspur in the case of Rajkumar Sharma Vs. Shriram Finance Co. Ltd. in Crl. M.P. No. 128/2014 disposed of on 7/8/2014 has also taken the same view.

17. The Supreme Court in a case reported in Indus Airways Pvt. Ltd. and Others Vs. Magnum Aviation Pvt. Ltd. and Another, , and another considered the conflicting views taken by the High Courts of Delhi and, High Court of Andhra Pradesh, Madras High court, Gujarat High Court, Kerala High court, and set the controversy at rest by holding that the post-dated cheques issued by the purchaser as an advance payment in respect of the purchase orders cannot be

considered towards discharge of legally enforceable debt or other liability, and, the consequently dishonor of such cheque does not amount to offence under Section 138 of the N.I. Act.

18. In the light of the above, it needs to be asserted that the case of the appellant fails for another reason also i.e. not making out a case for an offence punishable under Section 138 of N.I. Act. and the impugned judgment does not call for interference.

Accordingly, the appeal is dismissed.