

SUPREME COURT OF INDIA

A.C. Narayanan

Vs.

State of Maharashtra

Crl.A.No.73 of 2007

(P. Sathasivam CJI., Ranjana Prakash Desai and Ranjan Gogoi JJ.)

13.09.2013

JUDGMENT

P.SATHASIVAM, CJI.

1. Criminal Appeal No. 73 of 2007

2. This appeal is filed against the final common judgment and order dated 12.08.2005 passed by the High Court of Judicature at Bombay in Criminal Application Nos. 797, 798, 799, 801, 802 and 803 of 2002 whereby the High Court dismissed the applications filed by the appellant herein against the order of issuance of process against him for the offence punishable under Sections 138 and 142 of the Negotiable Instruments Act, 1881 (in short 'the N.I. Act) by the IXth Additional Chief Metropolitan Magistrate at Bandra, Mumbai in Complaint Case Nos. 292/S/1998, 293/S/1998, 297/S/1998, 298/S/1998, 299/S/1998 and 300/S/1998.

3. Brief facts:

(a) The appellant is the Vice-Chairman and Managing Director of the Company by name M/s Harvest Financials Ltd. 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.

(b) On 16.12.1997, Mrs. Doreen Shaikh, Respondent No.2 herein, 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 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 N.I. Act before the IXth Metropolitan Magistrate at Bandra, Mumbai. On 20.02.1998, Respondent No. 2 herein verified the complaint in each of these cases as Power of Attorney Holder of the complainants. Vide order dated 04.04.1998, the Additional Chief Metropolitan Magistrate, issued process against the appellant under Section 204 of the Code of Criminal Procedure, 1973 (in short 'the Code') for the offences punishable under Sections 138 and 142 of the N.I. Act.

(c) Being aggrieved of the issuance of the process, on 13.01.2000, the appellant herein moved an application for discharge/recall of process in each of the complaints. Vide common order dated 29.11.2000, the Additional Chief Metropolitan Magistrate, IXth Court, Bandra, Mumbai dismissed the applications filed by the appellant herein.

(d) Being aggrieved of the said order, the appellant herein preferred applications being Criminal Application Nos. 797, 798, 799, 801, 802 and 803 of 2002 before the High Court for quashing of the complaints. By impugned order dated 12.08.2005, the said applications were dismissed by the High Court.

(e) Against the said order, the appellant has preferred this appeal by way of special leave before this Court.

Criminal Appeal/2013 @ S.L.P.(Crl.) No. 2724 of 2008: Leave granted.

4. This appeal is directed against the judgment and order dated 19.09.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No. 578 of 2002 whereby the High Court allowed the appeal filed by M/s Surana Securities Ltd.-Respondent No.1 herein (the complainant) against the judgment and order dated 30.10.2001 passed by the Court of XVIII Metropolitan Magistrate, Hyderabad in C.C. No. 18 of 2000 dismissing the complaint and acquitting the accused for the offence under Section 138 of the N.I. Act.

5. Brief facts

(a) Respondent No.1 herein-the complainant is a limited company carrying on the business of trading in shares. The appellant herein is a client of the respondent-Company and used to trade in shares. During the course of business, the appellant became liable to pay an amount of Rs. 7,21,174/- towards the respondent-Company. The appellant, in order to discharge the said liability, issued six cheques amounting to Rs.1,00,000/- each and another cheque for Rs.1,21,174/- drawn on Andhra Bank on different dates. When the first six cheques were presented for encashment on 18.09.1997, the same got dishonoured with an endorsement 'funds insufficient'. Upon receiving the said information, the respondent-Company issued a legal notice to the appellant calling upon him to pay the amounts due but he did not pay the same.

(b) The Board of Directors of the 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.

(c) 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. Subsequently, vide order dated 03.05.2000, the said complaint was transferred to the Court of XVIII Metropolitan Magistrate, Hyderabad and was registered as C.C. No. 18 of 2000. By order dated 30.10.2001, the Metropolitan Magistrate dismissed the complaint filed by the respondent-Company under Section 138 of the N.I. Act.

(d) Aggrieved by the said order, respondent-company filed an appeal being Criminal Appeal No. 578 of 2002 before the High Court of Judicature, Andhra Pradesh at Hyderabad. By impugned order dated 10.09.2007, learned single Judge of the High Court allowed the appeal and set aside the order dated 30.10.2001 passed by the XVIII Metropolitan Magistrate, Hyderabad and convicted the appellant herein under Section 138 of the N.I. Act.

(e) Being aggrieved by the order passed by the High Court, the appellant has filed this appeal by way of special leave.

(f) By order of this Court dated 07.04.2008, this appeal was tagged with the Criminal Appeal No. 73 of 2007 arising out of S.L.P. (Crl.) Nos. 6703- 6708 of 2005. Hence, we heard both the appeals together.

6. Heard Ms. Indu Malhotra, learned senior counsel and Mr. Annam D.N. Rao, learned counsel for the appellants and Mr. Shankar Chillarge, Mr. Saurabh Kumar Tuteja, and Mr. Mayur R. Shah, learned counsel for the respondents.

7. On 04.01.2007, a Division Bench of this Court, on 04.01.2007, while considering Criminal Appeal No. 73 of 2007 (arising out of Special Leave Petition (Crl.) Nos. 6703-6708 of 2005) with regard to the interpretation of Section 142(a) of the N.I. Act observed that in view of the difference of opinion among various High Courts as also the decisions of this Court in M.M.T.C. Ltd. and Anr. vs. Medchl Chemicals and Pharma (P) Ltd. and Anr., (2002) 1 SCC 234 and Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors., (2005) 2 SCC 217, the matter should be considered by a larger Bench in order to render an authoritative pronouncement. In view of the same, it is desirable to extract the entire order of reference which 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 basic fact of the matter is not in dispute.

Several cheques on different dates were issued by the appellant herein which were dishonoured. The complainant executed a Special Power of Attorney on or about 28.11.1997, in favour of one Smt. Doreen Shaikh. She filed 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 NI 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 negated by the High Court in its impugned judgment.

In the aforementioned premises interpretation of Section 142 (a) of the NI Act comes up for consideration before us. We may notice that in *M.M.T.C. and Anr. vs. Medchl Chemicals & Pharma (P) Ltd. and Anr.* [2002 (1) SCC 234], a Division Bench of this Court has opined:

"This Court has, as far back as, in the case of *Vishwa Mitter v. O.P. Poddar* (1983 4 SCC 701) 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. It has been held that no court can decline 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."

8. However, in a later judgment in *Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors.* [2005 (2) SCC 217], albeit in a different context, another Division Bench of this Court overruled the judgment of the Bombay High Court in *Pradeep Mohanbay vs. Minguel Carlos Dias* [2000 (1) Bom. L.R. 908], inter alia opining as follows:

"Order 3 Rules 1 and 2 CPC 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 CPC 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 v. State of Rajasthan* (1986 2 WLN 713 (Raj.)) it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

"However, in the case of *Humberto Luis v. Floriano 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 CPC 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 CPC takes within its sweep 'depose'. We are unable to agree with this view taken by the Bombay High Court in *Floriano Armado*."

9. 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 & Anr.* [2005 (2) Mah. L.J. 1003] on the one hand and a decision of the Andhra Pradesh High Court in *S.P. Sampathy vs. Manju Gupta and Anr.* (2002 Cr.L.J. 2621), 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.

10. 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).

11. 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. Before going into the factual details, rival contentions and the legal issues, it is useful to refer Sections 138 and 142(a) of the N.I. Act which read as under:

“138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.- For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”

142. Cognizance of offences.- 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;

Xxxx xxx xxx”

8. In terms of Section 142 of the N.I. Act, no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. Learned senior counsel appearing for the appellant pointed out that with a non obstante clause, Section 142 provides that only two categories of persons, namely, the payee or the holder in due course of the cheque is entitled to file a complaint under Section 138 of the N.I. Act. According to learned senior counsel for the appellant, in the first case, the verification statement of solemn affirmation has been made by the constituted attorney and not by the complainant. It is further pointed out that the verification affidavit made by the constituted attorney is not on the basis of her personal knowledge and hence, it would squarely fall within the ambit of hearsay evidence and cannot be read in evidence in a court of law. By pointing out the same, learned senior counsel for the appellant submitted that the constituted attorney is incompetent to depose on behalf of the complainants. In other words, according to the appellant, the Power of Attorney holder is not competent to depose about the transaction that took place between the payee and the drawer of the cheque. Learned senior counsel also pointed out that Section 2 of the Power of Attorney Act, 1882 cannot override the specific provisions of the Statute which require that a particular act should be done in a particular manner (vide *Nazir Ahmed vs. King Emperor*, AIR 1936 PC 253, *Rao Bahasur Ravula Subba Rao & Ors. vs. Commissioner of Income Tax*, AIR 1956 SC 604 at 612-613). It was further pointed by learned senior counsel for the appellant that the decision in *Rao Bahasur Ravula Subba Rao* (supra) was followed in *Jimmy Jahangir Madan vs. Bolly Cariyappa Hindley (dead)* by LRs, (2004) 12 SCC 509.

9. In view of the above, learned senior counsel for the appellant relied on a decision of this Court in *Janki Vashdeo Bhojwani* (supra) wherein this Court held that Power of Attorney cannot depose for the acts done by the principal. Likewise, it was further held that he cannot depose for principal in respect of matters of which only the principal can have personal knowledge and in respect of which the principal is liable to be cross-examined. It was further held that the Power of

Attorney can appear only as a witness in respect of facts, which are within his personal knowledge.

10. In the case on hand, it is pointed out by learned senior counsel for the appellant that the constituted attorney did not even file the Power of Attorney along with the complaint or with the verifying statement and in view of the same, the Magistrate could not have issued process on the basis of such a complaint. No doubt, it is true that the Power of Attorney was produced along with the reply to the application for discharge filed by the complainant after two years of the order passed by the Additional Chief Metropolitan Magistrate issuing summons. In other words, the Power of Attorney holder is at best a witness to the execution of the Power of Attorney and not to the contents of the complaint.

11. Learned senior counsel for the appellant also pointed out that the provision under Section 200 of the Code is mandatory and obligatory on the part of the Magistrate to examine the complainant. However, a perusal of the Section makes it clear that examination of witnesses present, if any, is optional.

12. Learned senior counsel for the appellant further contended that the object of such examination is to ascertain whether there is a prima facie case against the accused of the commission of an offence as mentioned in the complaint and also to prevent the issuance of a process on a complaint which is either false or vexatious or intended to harass a person.

13. Learned senior counsel for the appellant further contended, by drawing our attention to the language of Section 200 of the Code, that the Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant. She further pointed out that where the language of an Act is clear and explicit, it must be given effect to, whatever may be the consequences, as has been held by this Court in *Vishwa Mitter of M/s Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot vs. O.P. Poddar and Ors.*, (1983) 4 SCC 701. In the said decision, this Court has held that if a special enactment provides for a specific procedure then that particular procedure has to be followed and hence, learned senior counsel for the appellant contended that the provisions of Section 142 of the N.I. Act regarding cognizance on the basis of a complaint filed by the payee or the holder in due course will prevail.

14. Learned counsel for the respondents met all the contentions which we will discuss hereunder.

15. In terms of the reference order, the following questions have to be decided by this Bench:

(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(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 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?

16. In order to find out the answers to the above and also to ascertain whether there is any conflict between the two decisions as pointed out in the referral order, let us consider the factual details and the ultimate dictum laid down in both the decisions.

17. In MMTC (supra), the appellant is a Government of India company. Respondent No. 1 therein is also a company and Respondent Nos. 2 and 3 were the Directors of the respondent-Company. The appellant-Company and the respondent-Company entered into a Memorandum of Understanding (MoU) dated 01.06.1994 and the same was slightly altered on 19.09.1994. Pursuant to the MoU, two cheques were issued by the respondent-Company in favour of the appellant-Company. When both the cheques were presented for payment, the same got returned with an endorsement “payment stopped by drawer”. Two notices were served by the appellant-Company on the respondent-Company. As the amounts under the cheques were not paid, the appellant-Company lodged two complaints through one Lakshman Goel, the Manager of the Regional Office (RO) of the appellant-Company. Respondents therein also filed two petitions for quashing of

the complaints. By the impugned order, both the complaints were quashed. In the said case as well as in the cases filed subsequently, the respondents took identical contentions in their petitions in order to quash the complaints, viz., that the complaints filed by Mr Lakshman Goel were not maintainable and that the cheques were not given for any debt or liability. In the impugned judgment, it was held that the complaints filed by Mr Lakshman Goel were not maintainable. The High Court held that it is only an Executive Director of the Company who has the authority to institute legal proceedings. While holding that the reasoning given by the High Court cannot be sustained, this Court held that Section 142 of the N.I. Act provides that a complaint under Section 138 can be made by the payee or the holder in due course of the said cheque. This Court further held that the complaints in question were by the appellant-company who is the payee of the two cheques. After finding that the Court cannot quash a complaint as stated by the High Court, this Court set aside the same and directed the trial Court to proceed with the complaints against Respondent Nos. 1 and 3 therein in accordance with law.

18. Now, let us consider the later decision of this Court in Janki Vashdeo Bhojwani (supra). This case relates to powers of Power of Attorney under the Code of Civil Procedure, 1908 and it was concluded that a complaint by a power of attorney holder on behalf of original plaintiff is maintainable provided he has personal knowledge of the transaction in question. This Court further held as under:

“12. In the context of the directions given by this Court, shifting the burden of proving on to the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power-of-attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

13. Order 3 Rules 1 and 2 CPC empower 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 CPC 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 can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.”

This Court further held thus:

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

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

19. In the case of Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of Humberto Luis v. Floriano Armando Luis on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to 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 CPC takes within its sweep

“depose”. We are unable to agree with this view taken by the Bombay High Court in Floriano Armando.

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

19. As noticed hereinabove, though Janki Vashdeo Bhojwani (supra), relates to powers of Power of Attorney holder under CPC 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 (1967) 1 SCR 807]. 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 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 MMTTC (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.

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.

21. The power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.

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.

26. While holding that there is no serious conflict between the decisions in MMTC (supra) and Janki Vashdeo Bhojwani (supra), we clarify the position and answer the questions 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 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 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.

27. We answer the reference on the above terms and remit the matter to the appropriate Bench for deciding the case on merits.