(2001) 03 MP CK 0036

Madhya Pradesh High Court (Gwalior Bench)

Case No: Criminal Revision No''s. 344 and 412 of 2000 with Cr. R. No. 64 of 2001

Dr. Anil Kumar Haritwal and others		APPELLANT
	Vs	
Sant Prakash Gupta and others		RESPONDENT

Date of Decision: March 22, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 190, 200, 256
- Evidence Act, 1872 - Section 60
- General Clauses Act, 1897 - Section 27
- Negotiable Instruments Act, 1881 (NI) - Section 138, 142, 142, 9
- Powers of Attorney Act, 1882 - Section 2

Citation: (2001) 2 ALD(Cri) 826 : (2001) 3 MPHT 325 : (2001) 2 MPJR 68 : (2001) 2 MPLJ 488

Hon'ble Judges: Mr. Fakhruddin, J

Bench: Single Bench

Advocate: Shri Padam Singh, Addl. Govt., Mr. V.K. Saxena, Mr. A.K. Barua, Mr. N.K. Modi, Mr. Sushil Chaturvedi, Mr. V. Sundaram and Miss Surbhi Singh, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

Fakhruddin, J.

This order shall govern the disposal of all the aforesaid three revision petitions.

Cr. Revisions 344 and 412 of 2000 have been filed against the order dated 29-8-2000, passed by the Trial Court whereby the application moved u/s 142A of the Negotiable Instruments Act, hereinafter referred to ''N.I. Act'', whereunder the objection raised regarding competency to file complaint by a person in question has been rejected and the complaint was held to be maintainable, taking cognizance in the matter.

The facts of Cr. Rev. No. 344/2000 are that the complainant Sant Prakash Gupta had made a complaint u/s 138 of the N.I. Act, as per Annexure P-l, against the petitioners-accused on the ground that the petitioners/accused took a loan in the sum of Rs. 3,00,000/- from the respondent/complainant through cheque No. 485117, dated 11-6-96 and in lieu thereof they had executed a promissory note in favour of the complainant to the effect that on demand they will return the payment of loan with interest as determined between the parties. The amount was to be returned after twelve months. It was alleged that the amount of interest alone was paid by the accused-petitioners and on 1-6-97 second promissory note was got executed and the first one was taken back by them and on that date one post-dated chequeNo. 315063, in the sum of Rs. 3,00,000/-, of Punjab National Bank, Chetakpuri, Branch Gwalior was handed over to the complainant/respondent and he was asked that the amount will be encashed on the due, after one month. It was submitted that on 7-10-98 when the complainant tendered the said cheque to the bank, the bank informed him that the petitioners/accused had no sufficient amount in their account for payment of the cheque and accordingly, the cheque was returned to the complainant.
The complainant thereafter intimated to the petitioners/accused and the notices as per registered A/d and UPC were also served upon through counsel, but no response was given. Ultimately, the complaint was filed by him.

It was stated that since the complainant/respondent is a bed ridden on account of paralysis and was not able to move and walk, the complaint was presented on his behalf by Mr. Raghunath Prasad Gupta, a power of attorney holder. The complaint (Annexure P-1) filed on the record of Cr. Rev. No. 344/2000, shows the thumb-impression of the complainant himself, which was attested as is apparent. The cause title of the complaint also shows the name of Sam Prakash Gupta s/o Shri Gurusharan as complainant, through power of attorney holder namely Raghunath Prasad s/o Shri Rambharosilal Jindal. The complaint is also accompanied by Vakalatnama of Shri P.L. Jain, Advocate and it contains the thumb-impression of the complainant, S.P. Gupta as well.

As regards Cr. Rev. No. 412/2000, the facts of this case are also similar as that of Cr. Rev. No. 344/2000. In this case, the complaint was signed by the complainant herself namely Smt. Alka Gupta against the petitioners/accused u/s 138 of the N.I. Act, as per Annexure P-l, on the record, contending therein that the petitioners/accused took a loan from her amounting to Rs. 10,25,000/- and in lieu thereof, on 15-12-97, promissory note in the sum of Rs. 25,000/-, on 26-12-97, promissory notes in the sum of Rs. 1,00,000/-, each on 21-10-97, one promissory note in the sum of Rs. 7,00,000/-, on 1-11-97, one promissory note in the sum of Rs. 1,00,000/- and on 12-12-97 one promissory note in the sum of Rs. 1,00,000/- were executed in favour of the com- plainant. On 15-12-98 cheque No. 315091, in the sum of Rs. 25,000/-, on 26-12-98 cheque No. 315086, in the sum of Rs. 1,00,000/-, on 21-10-98 cheque No.

315071, in the sum of Rs. 7,00,000/-, on 1-11-98 cheque No. 315081, in the sum of Rs. 1,00,000/- and on 12-12-98 cheque No. 31587, in the sum of Rs. 1,00,000/- were given to the complainant/respondent, which were total amount to Rs. 10,25,000/-. It was stated that the petitioners/accused after giving the aforesaid cheques asked the complainant/respondent that she will receive the payment of the same from the bank, if she will tender the cheques to bank after one month''s period, as they were post-dated cheques.

It was contended that on 30-3-99, when the complainant tendered the cheques for receiving payment thereof to the Bank, they were returned to her with the remark that the petitioners/accused are having no sufficient amount in their account for payment. The intimation of this was sent to the petitioners/accused through power of attorney holder Raghunath Prasad, who was appointed by her as mentioned in para 1 of the complaint to act in that behalf, but no satisfactory reply/answer was given by the accused. Then notices through counsel as per registered A/d and UPC were also served upon them to make a payment of the amount of loan within the period prescribed in the notice. When no response was given from the side of the petitioners, the complaint was filed by the complainant, through her power of attorney holder, named above, against the petitioners/accused for initialing the action u/s 138 of the N.I. Act against them. In this revision, the impugned order is of the same date, i.e., 29-8-2000 whereby the application of the petitioners/ accused was rejected. Hence this revision has been preferred by the petitioners/accused.

Before the learned Trial Court, when the complaints were filed by the complainants through their power of attorney holder, complainant Smt. Alka Gupta had appeared before the Court had examined herself and her evidence was recorded u/s 200, Cr.PC as per Annexure P-2 filed on the record of Cr. Rev. No. 412/2000. In Cr. Rev. No. 344/2000, the power of attorney holder namely Raghunath Prasad had examined himself before the Trial Court u/s 200, Cr.PC and his evidence was recorded as per Annexure P-2, copy whereof is on the record of Cr. Rev. No. 344/2000.

The learned Trial Court on the basis of material available on the record found a prima facie case against the petitioners/accused for committing an offence as alleged. The summons were issued against them securing their presence.

The petitioners/accused appeared before the Court and furnished the bail, as required. Thereafter the objection was raised u/s 142A of the N.I. Act, as per Annexure P-3 filed in Cr. Rev. No. 344/2000, para 1 of which goes to show that the complaint is filed by the power of attorney and not by the complainant personally. Para 2 is to the effect that u/s 142A of the N.I. Act the cognizance can be taken by the Court where the complaint is presented by the complainant personally who has to receive payment or the holder of the cheque, as defined in Section 9 of the Act and since that having not been done, the complaint is liable to be dismissed.

The reply to this application was filed by the other side denying the objection. The learned Trial Court having considered all the material on record, passed the impugned order as mentioned hereinabove. Hence this petition.

Learned counsel appearing for the petitioners/accused contended that the Trial Court was not justified in passing the order. It was contended that in this case the pertinent questions which arise for consideration are that :--

(1) Whether the person holding power of attorney is competent to institute complaint u/s 138 of the N.I. Act.

(2) Whether the evidence of such person, who had examined himself u/s 200, Cr.PC can be taken into consideration.

Learned counsel for the petitioners submitted that the requirement under the provisions of the Act is that the complaint is to be made by the person to the Magistrate and he is required to be examined u/s 200, Cr.PC. It is pointed out that this has not been done in the present case, as in the present case the complaint was filed by the power of attorney holder and he examined himself u/s 200, Cr.PC. It is submitted that the evidence of such person is not admissible in evidence being hit by Section 60 of the Evidence Act and as such cognizance cannot be taken on the basis of his evidence.

Learned Counsel for the petitioners/accused though stated that the suit has been filed by the other side for the same purpose and hence the complaint is not maintainable, but this point was not pressed by him.

Learned counsel for the respondents on the other hand opposed the contentions of the petitioners'' counsel and contended that the presentation may be by a person holding power of attorney. It is contended that there is nothing in the Act that the complaint u/s 142 should be filed by the aggrieved person personally to the Magistrate and that can also be not the intention of the Legislature.

Learned counsel for the petitioners/accused stated that the Negotiable Instruments Act is a Special Enactment and Section 190, Cr.PC applies to all the offences except the Special Enactment and as such the Magistrate can take cognizance u/s 142 of the N.I. Act. Sections 190, Cr.PC and 142 of the N.I. Act are relevant and reproduced below:--

"190. Cognizance of offences by Magistrates.-- (1) Subject to the provisions of this Chapter and Magistrate of the First Class, and any Magistrate of the Second Class especially empowered in this behalf under sub-section (2) may take cognizance of any offence,--

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try." Section 142(a) is relevant and quoted below :--

"142 (a). No Court shall take cognizance of any offence punishable u/s 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."

Section 190 of Cr.PC confers power on any Magistrate to take cognizance of any offence upon receiving a complaint of facts which constitute such offence. It does not speak of any particular qualification for the complainant. While u/s 142(a) of the N.I. Act, the complaint, is required to be made in writing by the payee or as the case may be, the holder in due course of the cheque; meaning thereby it empowers only two persons (1) payee or as the case may be (2) Holder in due course of the cheque to make the complaint. It is pointed out that words in two sections are quite different.

Under Section 142(a), the requirement is that the complaint should be made in writing to the Magistrate. No form is prescribed. The complaint however, must make an allegation which prima facie discloses the commission of an offence with the necessary facts for the Magistrate to take action, Examined this with reference to Section 142(a) of the N.I. Act under which there is mandatory requirement that the complaint has to be in writing and should be made by the payee or as the case may be, the holder in due course of the cheque.

Learned counsel for the accused-petitioners submitted that the complaint is required to be made personally u/s 142(a) and this section does not empower anybody else to make complaint, as has been done in this case.

Learned counsel appearing for the respondents on the other hand, contended that there is no such harsh requirement under the provisions that the complaint be filed only by the payee or holder in due course.

Learned counsel for the respondents placed reliance on 1994 (I) 314 Banking Cases (Kerala High Court) in the case of Hamsa Vs. Ibrahim, in which the respondent signed the complaint as power of attorney holder of complainant and the Magistrate took cognizance of offence. The High Court held that there is no illegality. The payee or holder in due course of a cheque can file a complaint in Court u/s 142 of N.I. Act through his power of attorney holder. In 1995 Cr.U 1102 (Mani Mekalai Vs. Chapaldas Kalyanji Sanghvi), the same view was expressed that the power of attorney holder is authorised to file complaint. In (II)1996 . BC 382 (Calcutta High Court), it was held that even a cheque can be issued by the power of attorney towards partial discharge of debt. In (I) 1997 BC 247 (Surinder Singh Vs.

John Impes (Pvt.) Ltd.) (Punjab & Haryana High Court), it is held that there is no requirement that the complaint can be field only by payee or holder in due course personally and not through his duly authorised agent. In the case of Payyatisavtiri Devi Vs. Malireddy Damayanthamma Rep. by G.P.A. and another, reported in (I) 1998 BC 144 (A.P. High Court), the competency of General Power of Attorney to file complaint was considered and held that the person holding power of attorney is competent to institute complaint u/s 138 of the N.I. Act. In 1998 (II) BC 108 (Anil G. Shah Vs. J. Chitranjan Co. & another), the Gujrat High Court also held that the complaint filed by the power of Attorney holder is maintainable and the complaint lodged by him is not illegal or invalid.

Learned counsel for the respondents further relied upon 1998 DCR 310 (Kerala High Court) and referred to paras 7 to 9, in which it is held that complaint can be filed by duly authorised person like Advocate or power of attorney and insistence on part of Court that complaint will be accepted only if same was presented by complainant personally is not conducive to interest of justice particularly when it was filed on last day of limitation and complainant was hospitalised. In 1998 DCR 346, the Bombay High Court held that the complaint filed by person holding power of attorney from complainant was not liable to be quashed merely because complaint in title did not mention that fact. Para 9 of that case was referred. Reliance is further placed by the counsel for the respondents on 1999 (II) BC 561 (A.P. High Court) to contend that the power of attorney holder is authorised to file complaint. In (I) 1999 BC 296 (Kerala High Court), it is held that the power of attorney should be permitted to file complaint. In 1999 DCR 201 (Bombay High Court), in which the complaint was filed by the Company through its Manager, it is held that the same is not open to challenge, however the proof of authorisation is required to be adduced at the time of trial. Paras 15,20 and 22 were referred to. Further in 1999 DCR 306, Gujrat High Court held that the complaint by power of attorney holder of payee or the holder, in due course, can be filed and the power of attorney holder can act on behalf of the payee or the holder. Reliance is also placed on the decision of Kerala High Court reported in 2000 DCR 473, wherein it is held that the attorney holder of payee is entitled to act u/s 27 of the General Clauses Act, 97.

Learned counsel for the respondents further submitted that personal appearance of the complainant is not necessary. It is contended that Section 256 Cr.PC is applicable every where complainant is company or any other juristic person. Reliance is placed on the decision of the Apex Court reported in Associated Cement Co. Ltd. Vs. Keshvanand, .

On the basis of the aforesaid decisions of Apex Court as well as other High Courts, it is stated that there is no requirement at all that the complaint must be filed by the payee or holder in due course personally and the person even holding power of attorney is competent to institute complaint u/s 138 of the Act.

Admittedly, the complaint in the present case is filed by the person holding power of attorney. Section 2 of the Powers of Attorney Act, 1882 provides that an act committed by the holder of the power of attorney would be presumed to be an act committed by the person who gives power of attorney. Thus, in view of the specific provisions of Section 2 of the said Act, it would have to be presumed as per law that the complaint lodged by the power of attorney holder is a complaint lodged by the payee. Section 142 of the N.I. Act also does not specifically say that the complaint must be lodged by the complainant personally. The Statute also does not insist that the complaint should be filed personally by the payee or the holder in due course. The power of attorney agent is virtually a payee himself or the holder in due course for the purposes of Section 142(a) of the N.I. Act and he is competent to make a complaint in writing u/s 138 of the Act.

So far as interpretation of the provisions of Section 138 are concerned, the Apex Court had an occasion to deal with the matter in the case of K. Bhaskaran Vs. Sankaran Vaidhyan Balan and Another, , in which it is held :--

"..... The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligations to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (b) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to "make demand" by giving notice. The thrust in the clause is on the need to "make a demand". It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part over and the next depends on what the sendee does."

It was further held that:--

"If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice at the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure."

It is borne out from the perusal of the aforesaid judgment rendered in the case of K. Bhaskaran (supra), by the Apex Court that the context envisaged in Section 138 of the N.I. Act invites a liberal interpretation for the person, who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The Apex Court further held that the Court must keep in its mind that it should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

It is pertinent to mention here that in this modern trend, the payment are offenly made by the cheques or the drafts in the commercial and contractual transactions as payment by cash is risky from the point of view. Even the instructions are issued by some departments like Income Tax, Commercial Tax etc. that the amount to be paid if beyond the limit prescribed by them, the same be paid by the cheques or the drafts. Therefore, at a time many cheques are issued and received. The Company, Firm, Society or even a Govt. In some matters, may be the payee or holder of the cheques and it is not possible for them to appear personally in the Court to make a complaint to the Magistrate. Under the circumstances, the complaint is required to be filed by the authorised person/agent or the power of attorney holder of the payee, so appointed. In that situation, the liberal interpretation for the person, who has the statutory obligation to give notice, as he is presumed to be the loser in the transaction must be given. Therefore, even though Section 138 is a penal statute, the Court should not adopt such an interpretation, which helps a dishonest evader and clips an honest payee.

So far as the present case is concerned, the complainant has stated in the complaint specifically that the petitioners/accused had issued cheques of the post-dated for refund of the loan amount, in favour of the claimant and when the said cheques were presented for realisation to the bank concerned, the bank informed that there could not be realisation of the amount of the cheques on account of insufficient amount in their account. It is also contended that thereafter, the said respondent/claimant had informed the petitioners/accused about it and had also served notices through counsel as per registered A/d and UPC, to pay the amount of loan, but there was non-compliance of the said demand notice and ultimately, the complaint was filed by the complainant through power of attorney namely Raghunath Prasad who himself was examined u/s 200, Cr.PC by the Trial Court and the statement was recorded, in Criminal Revision No. 344/2000, as the complainant Sant Prakash Gupta of that revision, is a bed ridden patient on account of paralytic attack. He cannot move and walk and that is why the complaint was filed by his power of attorney holder. So far as other Criminal Rev. No. 412/2000 is concerned, the complainant therein is Smt. Alka Gupta. She had appeared before the Court and was also examined u/s 200 Cr.PC. Her statement recorded is there on the record. She filed the complaint through her power of attorney holder, i.e., Raghunath Prasad, after signing it, as is evident from perusal of the complaint.

Having considered the entire material and in view of the decisions referred to hereinabove and the discussions made, this Court agreeing with the views expressed by the other High Courts is further of the opinion that the power of attorney is the instrument by which a person is authorised to act as the agent of the person granting it. Section 2 of the Power of Attorney Act empowers the donee of a power of attorney to do anything "in and with his own name and signature", by the authority of the donor of the power. This section declares that everything so done "shall be as effectual in law as if it has been done by the donee of the power in the

name and with the signature of the donor thereof and as such, the act committed by the holder of the power of attorney would be presumed to be an act committed by the person who gives power of attorney. In that view of the matter, lodging of the complaint by the power of attorney holder of the payee could not be said to be illegal or invalid and the Trial Court was justified in holding so and declaring the complaint to be maintainable.

In view of what has been stated above, so far as Cr. Rev. No. 344/2000 and Cr. Rev. No. 412/2000 are concerned, in the opinion of this Court, there is no illegality committed by the Trial Court in passing the impugned orders dated 29-8-2000 in the aforesaid two matters and the orders of the Trial Court cannot be faulted with. Consequently, both the revisions fail and are dismissed.

Learned counsel for the parties pointed out that the matter is pending since long. In that view of the matter, the Trial Court is expected to decide the case as early as possible preferably within a period of six months, from the date of the production of certified copy of this order.

So far as Cr. Rev. No. 64/2001 is concerned, it is against the order dated 25-11-2000, which has been filed by the complainant-Sant Prakash Gupta to the effect that the case is being adjourned from time to time without valid reasons and therefore the trial of the case should be expedited.

Since there is already direction issued to the Trial Court to decide the case as early as possible in para 32 of the order, no further order is required to be passed in this revision. It is accordingly disposed of.

The record of the Trial Court be sent back to the Trial Court alongwith photocopy of this order.

C.C. as per rules.