

Bombay High Court Dr. Pradeep Mohanbay vs Minguel Carlos Dias on 1 October, 1999 Equivalent citations: 2001 BomCR Cri, (2000) 1 BOMLR 908 Author: R Batta Bench: R Batta JUDGMENT R.K. Batta, J. 1. The petitioner was held guilty under Section 138 of the Negotiable Instruments Act (hereinafter called as “the said Act”) and was sentenced to pay a fine of Rs. 18,000/-, in default simple imprisonment of one month by the Judicial Magistrate, First Class, Margao. The petitioner filed an appeal before the Sessions Judge, Margao against the said order and the learned Sessions Judge, by judgment dated 12.3.1999 maintained the conviction of the petitioner, but reduced the fine to Rs. 13,500/- and in default to undergo simple imprisonment of one month. He further ordered that a sum of Rs. 9,000/-, out of the said fine shall be paid as compensation to the complainant/respondent No. 1. The petitioner challenges the said order of conviction and sentence in this revision. 2. The only point which was argued before the Sessions Judge was that whether a complaint could be filed by Power of Attorney in view of Section 142 of the Act and whether the Power of Attorney could give evidence on behalf of the complainant? The same point has been urged before me by learned Advocate for the petitioner. 3. Learned Advocate for the petitioner states that though there are rulings of various High Courts on the question that a complaint could be filed in view of Section 142 of the said Act through Power of Attorney, yet there is no pronouncement of the High Court on the question as to whether Power of Attorney could also depose on behalf of the complainant. The learned Advocate for the petitioner placed before me ruling in A.K. Roy and Another v. State of Punjab and Ors., , Hamsa v. Ibrahim, I (1994) BC 678=IV (1993) CCR 3317=1994(1) Crimes 395 and Suresh Srinivasan Iyengar v. State of Maharashtra and Ors., II (1999) CCR 609=1999(1) Crimes 161. According to her, Power of Attorney cannot depose on behalf of the complainant even though it may be possible to file a complaint through Power of Attorney. 4. Learned Advocate Mr. N. Afonso, argued on behalf of respondent No. 1 that not only complaint could be filed through Power of Attorney, but the Power of Attorney can depose on behalf of the complainant during the course of trial. 5. Learned Public Prosecutor on behalf of the State/respondent No. 2 submitted that it is now well settled that a complaint for offences under Chapter XVII of the said Act, could be filed through Power of Attorney in view of Section 142 of the said Act and the Power of Attorney is entitled to prosecute the complaint so filed. He urged that the Power of Attorney can certainly be examined as witness for the complainant and that there is no merit in the petition. 6. Section 142 of the said Act which deals with cognizance of offences, reads as under; “142. Cognizance of offences.—Notwithstanding anything contained in the Code of Criminal Procedures, 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; (b) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138; (c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under Section 138.” I shall first refer to the

pronouncement of various High Courts on the question posed and which is required to be decided in this revision. 7. In *Hamsa v. Ibrahim* (supra), it has been held that a Power of Attorney of a payee or holder in due course can file complaint under Section 142 of the said Act in this case, a complaint was filed for an offence under Section 138 of the said Act, of which the Magistrate had taken cognizance and issued process. The petitioner therein invoked inherent powers of the High Court under Section 482 of the Code of Criminal Procedure for quashing of the complaint. The argument put forward on behalf of the petitioner therein was that the Power of Attorney holder of the payee has no locus standi to file a complaint under Section 138 of the said Act. This argument was repelled after taking into consideration the judgment of the Apex Court in *Ravula Subbarao v. Commissioner of Income Tax*, wherein the legal position regarding right to appoint an agent had been laid down. Accordingly, it was held by Kerala High Court that there is no requirement under Section 142 of the said Act that the complaint should be made by the payee or the holder, in due course, personally. 8. In *Ravula Subba Kao and Ors. v. Commissioner of Income Tax, Madras*, (supra), the Apex Court has held after taking into consideration the provisions of the Indian Contract Act, 1872, that the law in India is the same in respect of right to appoint an agent for any purpose whatsoever which is recognised as a common law right. The Supreme Court has further pointed out that this rule is subject to certain well-known exceptions such as when the act to be performed is personal in character or that the act to be performed is annexed to a public office, or to an office involving fiduciary obligations. But apart from such exceptions the law is well settled that whatever a person can do himself, he can do through an agent. 9. The Madras High Court in *Manimekalai v. Chapaldas Kalyanji Sanghvi*, 1995 Cri.L.J. 1102, has laid down that the payee represented by the Power of Attorney can very well file a complaint for offence under Section 138 of the said Act. In *Smt. Payyati Savitri Devi v. Malireddy Damayantamma and Anr.*, II (1999) BC 561=1997 Cri.L.J. 3862, the Andhra Pradesh High Court has laid down that a complaint under Section 138 of the said Act can be filed by a person holding Power of Attorney of the complainant. 10. In *P.A. Verghese and Ors. v. M.A.A. Communications Pvt. Ltd.*, I (1997) CCR 181 = 1997 Cri.L.J. 4208, complaint for an offence under Section 138 of the said Act had been filed by Power of Attorney, who was also working as Accounts Officer in complainant company and it was held by the Karnataka High Court that the complaint was maintainable. In this case, process was issued after examining the Power of Attorney. 11. In *Suresh Srinivasan Iyengar v. State of Maharashtra and Ors.*, (supra), a complaint was filed by duly authorised Attorney, though in the title of the complaint it was not mentioned that he was Power of Attorney holder of payee. But Power of Attorney was duly brought to the notice of the Magistrate and the complaint was entertained after the Magistrate was satisfied that he was duly constituted Attorney of the complainant. 12. Thus, insofar as filing of complaint by Power of Attorney for offence under Section 138 of the said Act in terms of Section 142 of the said Act is concerned, there is unanimity in the views expressed by various High Courts that a complaint for offence under Section 138 of the said

Act, can be filed by Power of Attorney in terms of Section 142 of the said Act. I am in respectful agreement with this proposition. 13. Therefore, the question which remains to be determined is whether the Power of Attorney can depose on behalf of the complainant. Under Order 3, Rule 2 of the C.P.C., the recognized agents of parties can be authorised by Power of Attorney to appear, act or make applications on behalf of such parties. This, obviously, does not include power to depose on behalf of the party who gives such Power of Attorney. Nevertheless, such Power of Attorney can appear as a witness for the party and depose in respect of the facts which are within his knowledge and on the basis of the record on which reliance is placed in the matter. Therefore, there is no bar for the Power of Attorney to act as a witness in a complaint filed on the basis of Power of Attorney given to him by the complainant. I am supported in this view taken by me by a judgment of Rajasthan High Court, to which my attention has been drawn by learned Advocate for the petitioner. In *Ram Prasad v. Hari Narain and Ors.*, . In this judgment, it has been laid down that the word “acts” in Order 3, Rule 2 does not include act of Power of Attorney holder to appear as witness on behalf of a party and as such Power of Attorney is not entitled to appear as witness for a party appointing him as Power of Attorney in the matter. After relying upon an earlier judgment of the Rajasthan High Court, wherein it was ruled : “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 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”. it has been laid down in this judgment that the word “acts” used in Order 3, Rule 2 of the C.P.C. does not include the act of Power of Attorney holder to appear as a witness on behalf of the party, though Power of Attorney holder of a party can appear 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. 14. Coming to the applicability of this principle in criminal law, it is well settled that any person can set the criminal law in motion and, as such, a complaint regarding an offence, can be filed by any person who knows about the commission of the offence. Nevertheless, Section 142 of the said Act lays down that no cognizance of the offence under Section 138 of the said Act shall be taken, except on a complaint of payee or holder in due course. Section 142 of the said Act does not contemplate that the complaint should be personally filed by the complainant. The complainant can appoint a Power of Attorney for filing the complaint in view of Section 142 of the said Act. However, neither Code of Criminal Procedure nor the said Act contemplates that anyone can depose for and on behalf of the complainant. In such complaint, the Power of Attorney is entitled to appear as a witness and depose in respect of facts which are within his knowledge and on the basis of record on which reliance is placed. In this case, it appears that no objection was taken when the Power of Attorney examined him in the case and the deposition of the Power of Attorney can be taken into consideration as a witness. 15. In

view of the above, I do not find any merit in this revision and the revision is, hereby, dismissed.