

Vinita S Rao vs M/S Essen Corporate Ser.P.Ltd.& Anr on 17 September, 2014

Equivalent citations: AIR 2015 SUPREME COURT 882, 2014 AIR SCW 5822, AIR 2014 SC (CRIMINAL) 2159, 2015 ACD 33 (SC), 2014 (4) AIR KANT HCR 591, (2015) 4 KANT LJ 307, (2014) 4 BOMCR(CRI) 817, (2014) 4 ALLCRILR 750, 2015 (1) SCC 527, (2015) 2 MPLJ 605, (2014) 2 NIJ 337, (2014) 87 ALLCRIC 959, (2014) 4 CURCRIR 121, (2014) 59 OCR 654, (2014) 4 RECCRIR 253, (2015) 2 BANKCAS 58, (2014) 10 SCALE 632, 2015 CALCRILR 2 539, 2014 ALLMR(CRI) 4170, 2014 CRILR(SC&MP) 993, (2015) 119 CUT LT 228, (2015) 2 MH LJ (CRI) 552, (2015) 3 MAH LJ 573, (2014) 4 CRILR(RAJ) 993, (2015) 2 CIVLJ 338, (2014) 4 CIVILCOURTC 358, 2014 CRILR(SC MAH GUJ) 993, (2015) 1 ALD(CRL) 1, (2014) 3 UC 2023, (2014) 144 ALLINDCAS 58 (SC), (2015) 3 MH LJ (CRI) 1, (2014) 4 CRIMES 495, 2015 (1) SCC (CRI) 726

Bench: N.V. Ramana, Ranjana Prakash Desai

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL Nos.2065-2066 OF 2014

[Arising out of Special Leave Petition (Crl.) Nos.4682-4683 of 2012]

Vinita S. Rao

...

Appellant

Vs.

M/s. Essen Corporate Services
Pvt. Ltd. & Anr.

...

Respondents

J U D G M E N T

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.

2. The challenge in this appeal is to the orders dated 7/3/2012 and 12/3/2012 passed by a learned Single Judge of the Karnataka High Court allowing the criminal revision petition filed by the respondents under Section 397(1) of the Code of Criminal Procedure, 1973 ("the Code"). The prayer

made by the respondents in the criminal revision petition was for setting aside order dated 17/9/2009 passed by the Fast Track Court (Sessions)-V, Bangalore in Criminal Appeal No.1897 of 2006 and also order dated 9/11/2006 passed by the Court of the XVth Addl. Chief Metropolitan Magistrate, Bangalore in C.C. No.4116 of 2004.

3. The appellant is the original complainant. The respondents are original accused 1 and 2 respectively. Respondent 1 is a private limited company and respondent 2 is its Managing Director who looks after the day- to-day affairs of respondent 1 company. The respondents are financial consultants and sub-brokers who are engaged in the business of trading inter alia on the National Stock Exchange, the Bombay Stock Exchange and the Bangalore Stock Exchange.

4. The appellant filed a complaint for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ('the NI Act') against the respondents. Gist of the complaint needs to be shortly stated.

The appellant and her husband had discussions with respondent 2 regarding trading in 10000 shares of Hindustan Lever Limited belonging to the appellant. The respondents advised the appellant to entrust the said 10000 shares to them and it was represented that those shares would not be sold outright; that the respondents would utilize their expertise and knowledge of the markets to sell and buy back the shares regularly and they would thereby earn profits for the appellant. The shares were to be held in trust and any dividends and benefits accruing on the 10000 shares to the appellant were to be made over to her and, at the same time, the respondents undertook to trade in the shares when time was favourable, after studying market trends to make profit for the appellant. It was asserted that the appellant could, at any time, cease trading and take back the said 10000 shares. On this understanding, the appellant entrusted the said 10000 shares of Hindustan Lever Limited to the respondents by transferring the shares from her Demat Account to that of the respondents. On 05/03/2002 the respondents addressed a letter acknowledging receipt of the said 10000 shares. In the month of April, 2002, the appellant had a doubt about the intention of the respondents. On 25/04/2002 the appellant addressed a letter to the respondents requesting them to return the said 10000 shares. On 20/05/2002 the respondents replied, undertaking to return the said shares in lots of 500/10000 citing difficulties between them and their main broker as reason for delay. Another letter was addressed by the respondents undertaking that the first lot of 500 shares would be returned by 24/05/2002 and all 10000 shares would be returned by 30/06/2002. A separate letter was addressed in relation to the monies due to the appellant on account of dividends accruing and profits from transactions in the shares. On 25/06/2002 the respondents sought extension of time to return the shares and confirmed that a sum of Rs.1,54,000/- was due to the appellant on account of dividends and profits from share transactions. By August, 2002, the respondents returned only 1460 shares instead of 6000 shares as agreed by them. The appellant addressed a letter demanding the balance 8540 shares. The respondents sought time till 31/12/2002 to return the shares and, in return for extension of time, offered to give cheques as surety for the value of shares being Rs.20,75,220/- as well as Rs.1,79,500/- being the amounts due towards dividends and profits from transactions in shares. The appellant agreed to and extended time till 31/12/2002. On 26/12/2002, the respondents returned another 1040 shares to the appellant. Thus, in all, 2500 shares were returned to the appellant. However, 7500 shares

remained with the respondents. The respondents sought time upto 30/06/2003. To secure the interest of the appellant, the respondents offered to replace the previous cheques dated 30/09/2002 with fresh cheques securing the value of 7500 shares and the money due to the appellant. The appellant acceded to this request in the hope of recovering her shares. The respondents addressed two letters dated 22/02/2003 reiterating their commitment to return the shares as well as amounts due to the appellant and recording the deposit of two cheques totalling Rs.18,22,500/- towards the value of shares as well as a separate cheque for Rs.1,79,500/- towards dividends and profits due from the transactions in the said shares.

As the extension of time was expiring, the respondents again sought further extension of time till 31/12/2003 vide letter dated 30/6/2003 and for replacement of earlier cheques, enclosed two cheques; being cheque No.392942 dated 01/08/2003 for a sum of Rs.8,50,000/- and cheque No. 392943 dated 01/08/2003 for a sum of Rs.9,72,000/- both drawn on Corporation Bank, M.G. Road Branch, Bangalore, towards the value of 7500 shares in Hindustan Lever Limited. The respondents addressed another letter dated 30/6/2003 enclosing another cheque bearing No. 392944 dated 01/08/2003 for a sum of Rs.1,79,500/- towards the value of profits and dividends received in respect of the said shares. It was stated in the said letter that if the respondents fail to return the shares by 31/12/2003, the appellant could deposit the said cheques to recover their dues. As the respondents had failed to return the 7500 shares or make over the amounts due as promised, the appellant presented the three cheques bearing Nos. 392942, 392943 and 392944 to her banker – the Shamrao Vithal Co-operative Bank Limited for collection on 2/1/2004. On 03/01/2004 the three cheques were returned unpaid by the respondents' bank, under two cheque return memos citing 'insufficient funds'. On receipt of the intimation of dishonour, the appellant issued a legal notice to the respondents demanding payment. As the respondents failed to pay, the appellant, not being in good health, executed a power of attorney dated 03/03/2004 authorising her husband Sudhir Gulvady to file and prosecute the complaint against the respondents.

5. On 03/03/2004 the appellant filed a complaint before the jurisdictional Magistrate against the respondents alleging offence punishable under Section 138 of the NI Act. Although, the complaint was signed by the appellant, it was presented before the Magistrate by the appellant's husband Sudhir Gulvady on the strength of power of attorney. It was stated in the complaint that the appellant was unable to come to the court as she was not keeping good health and, hence, she was being represented in the proceedings by her husband and power of attorney holder Sudhir Gulvady, who had personal knowledge of the entire transaction. According to the appellant, the power of attorney was filed along with the complaint.

6. On 05/03/2004 the statement of the appellant's husband, who is her power of attorney holder was recorded. Cognizance of the complaint was taken and summonses were issued to the respondents. The respondents entered appearance and pleaded not guilty. On 01/09/2005, 20/09/2005, 22/02/2006, 16/03/2006 and 02/05/2006 the appellant was examined-in-chief and cross-examined by the respondents' counsel. Respondent 2 was examined and cross-examined on various dates.

7. In the written arguments submitted by the respondents, it was contended that though the sworn statement of the power of attorney holder was recorded, he was not examined by the complainant and since sworn statement of the complainant was not recorded complaint was not maintainable.

8. On 09/11/2006 the trial court convicted the respondents of the offence punishable under Section 138 of the NI Act. The respondents were sentenced to pay a fine of Rs.30,12,000/- out of which a sum of Rs.30,02,000/- was directed to be paid to the appellant as compensation and balance of Rs.10,000/- was directed to be paid to the State. Respondent 2 was sentenced to six months' simple imprisonment in the event of failure to pay the fine amount.

9. The respondents filed an appeal in the Court of Principal City and Sessions Judge, Bangalore being Criminal Appeal No.1897 of 2006. On 17/09/2009 the said appeal was rejected by the Fast Track Court-V, Bangalore.

10. Aggrieved by the order of Fast Track Court-V, Bangalore, the respondents preferred a criminal revision petition in the Karnataka High Court. By the impugned orders, the Karnataka High Court overturned the concurrent judgments of the courts below and acquitted the respondents only on the ground that the complaint had been presented by the appellant's husband as her power of attorney holder but the power of attorney was not produced and that in strict compliance with Section 200 of the Code, the appellant must be examined before cognizance can be taken of the complaint, which was not done.

11. We have heard learned counsel for the parties and perused their written submissions. Learned counsel for the appellant submitted that when the statement of the appellant was recorded on oath, the power of attorney was produced. The High Court erroneously held that it was not produced. It was part of the trial court's record. This is clear from the fact that it bears PCR number as well as CC number. Counsel submitted that only plea raised by the respondents before the courts below was that the appellant's husband who is her power of attorney holder was not examined. The respondents never raised any plea that the power of attorney was not produced. Counsel submitted that reliance of Chandrashekarappa v. Sharanabasappa[1] is erroneous because it is contrary to the view taken by this Court in A.C. Narayanan v. State of Maharashtra[2]. Counsel submitted that the submission that cheques were issued as a security has no basis. They were issued in respect of a crystallized liability and this was acknowledged by respondent 1 in his letters. Counsel submitted that in the circumstances, the impugned order deserves to be set aside.

12. Learned counsel for the respondents, on the other hand, submitted that the copy of power of attorney which is filed in this Court and which is certified by the High Court does not bear any exhibit numbers which proves that it was never filed before the trial court. The statement of power of attorney holder establishes that the power of attorney was neither filed nor exhibited. Counsel pointed out that the sworn statement of the appellant is silent on the power of attorney. Counsel submitted that the objection qua the power of attorney was duly raised by the respondents before the trial court. Pertinently the list of exhibited documents does not mention any power of attorney. In this connection, counsel relied on A.C. Narayanan. He submitted that in this case, it is held by this Court that the power of attorney holder may file the complaint but the complainant ought to file

pre-summoning evidence affidavit in support of the complaint. Since this is not done, the complaint must be dismissed on that ground. Counsel further submitted that the cheques were not issued in discharge of legally recoverable debt. Letters dated 1/10/2002 and 22/2/2003, exchanged between the appellant and the respondents mention that the cheques have been issued as security. This is reflected in the complaint and cross-examination of the complainant. In support of this submission, the counsel relied on *M.S. Narayana Menon v. State of Kerala*[3], *Sudhir Kumar Bhalla v. Jagdish Chand*[4] and *Kamala S. v. Vidhyadharan*[5].

13. We shall first deal with the submission that copy of power of attorney was not produced by the appellant. We have carefully perused the written submissions filed by the respondents in the trial court. This submission was not raised and consequently not considered by the trial court. In fact, since this submission pertains to documents produced in the trial court, it ought to have been raised there. It could have been more appropriately dealt with by the trial court. But it was not raised. The respondents filed appeal in the Sessions Court. In the appeal memo, no contention was raised that copy of power of attorney was not produced in the trial court. Not only was this submission not raised in the appeal memo, it appears to have not been raised in the Sessions Court at the stage of arguments. The Sessions Court has, therefore, not dealt with it. This submission was raised for the first time only in the High Court. The fact that this submission was not raised in the trial court and in the lower appellate court weakens its force. The High Court, in our opinion, erred in entertaining such a belated argument. Having entertained the argument, the High Court dealt with it in a very perfunctory manner. The High Court observed that Sudhir Gulvady, the power of attorney holder did not produce the power of attorney and, hence, he could not have been examined on behalf of the complainant. The High Court further observed that the complainant who examined herself also did not say why the power of attorney was not produced. Significantly, the appellant has not been questioned on this aspect. Not even a suggestion was made to her that she had not given any power of attorney to her husband and that it was not produced on record.

14. It was submitted by the counsel for the appellant that the power of attorney was very much a part of the trial court's record and, in fact, it bears the PCR number as well as the CC number, which shows that it was a part of the record. A photocopy of the said power of attorney is on record at Annexure-21 to the appeal memo. A true typed copy thereof is also annexed to the present appeal. It is stated in the rejoinder filed by the appellant in this Court that the power of attorney was available on the record of the High Court and a certified copy was issued by the High Court itself. It is stated that a true copy of the certified copy has been produced as Annexure P-21 to the special leave petition. It is further stated that as a matter of practice, the power of attorney is filed along with the vakalat filed in the matter and not with the list of documents listing other exhibits pertaining to the merits of the case. In the circumstances, non-mentioning of the power of attorney is not unusual and on this basis, no conclusion can be drawn that the said document was not on record. This assertion is not traversed by the respondents.

15. The power of attorney is specifically given to Sudhir Gulvady for court cases. The relevant clauses of the said power of attorney read as under:

“1. To represent me before the said Court to all intents and purposes in connection with the said criminal case to be filed, prosecuted before the Criminal Court under Section 138 of the Negotiable Instruments Act.

2. And to appear for and prosecute and defend all actions and proceedings, to sign and verify all plaints, written statements and other pleadings, applications, petitions or documents to the court, to deposit, withdraw and receive documents and any money or moneys from the court or from the opposite party, either in execution of the decree or otherwise and, on receipt of payment thereof, to sign and deliver proper receipts and discharge the same for and on my behalf.

3. To engage and appoint any solicitor, advocate or advocates or counsel to act and plead and otherwise conduct the said case whenever my said attorney thinks proper to do so.”

16. Having perused the copy of the power of attorney, we are satisfied about its authenticity. We view this power of attorney in light of the statement made by the appellant in the complaint that because she was not keeping good health and was unable to come to the court and because the whole transaction was within the knowledge of her husband, who is her power of attorney holder, her husband represented her. We have no reason to doubt the submission of learned counsel for the appellant that it was very much on record. In any case, the fact that this submission which is factual in nature was first time raised in the High Court casts a shadow of doubt on its truthfulness. We reject this submission.

17. The second submission of the respondents is that the complaint cannot be filed by a power of attorney holder. This question is no more res integra. A Division Bench of this Court while considering a criminal appeal arising out of conviction under Section 138 of the NI Act noticed diversion of opinion between different High Courts on the question whether the eligibility criteria prescribed by Section 142(a) of the NI Act would stand satisfied if the complaint itself is filed in the name of the payee or the holder in the due course of the cheque and/or whether the complaint has to be presented before the Court by the payee or the holder of the cheques himself. The Division Bench felt that another issue which would arise for consideration is whether the payee must examine himself in support of the complaint keeping in view the insertion of Section 145 in the NI Act (Act No.5 of 2002). The Division Bench was of the view that the matter should be considered by a larger Bench so that there can be authoritative pronouncement of this Court on the above issues. In A.C. Narayanan, the three-Judge Bench of this Court dealt with this reference. This Court noted the questions which had to be decided by it in terms of the reference order as under:

“(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?”

18. After considering the relevant provisions of the NI Act and the relevant judgments on the point, this Court clarified the legal position and answered the questions in the following manner.

“(i) Filing of complaint petition under Section 138 of NI 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 NI 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 NI 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 NI 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.”

19. Thus, it is clear that the complaint under Section 138 of the NI Act can be filed through the power of attorney holder. In this case, Sudhir Gulvady is the power of attorney holder of the appellant and he has filed the complaint on her behalf. The learned Magistrate recorded the statement of the power of attorney holder under Section 200 of the Code on 5/3/2004 and issued summons. We have perused the said statement. It is signed by the power of attorney holder and by

learned Magistrate. A.C. Narayanan states that power of attorney holder must have knowledge about the relevant transactions. There can be no dispute about the fact that in this case, the power of attorney holder being the husband of the appellant has witnessed all transactions and he possesses due knowledge about them. He is associated with all transactions at all crucial stages. The appellant has placed this fact in the forefront in her complaint. The relevant paragraph of the complaint reads as under:

“3. The complainant is represented by her Power of Attorney Holder Mr. Sudhir Gulvady, her husband as the complainant is unable to come to the Court due to her not keeping good health and the whole transaction is also within the knowledge of her Power of Attorney holder who is her husband”.

20. The appellant has examined herself on oath. In her evidence, she has stated that the office of the respondents is in the same building in which her husband's office is situated and her husband being acquainted with respondent 2, who is the Managing Director of respondent 1, he was aware that respondent 2 was functioning as a broker and, hence, she along with her husband had initial discussion with respondent 2 for transactions in 10000 shares. Her evidence substantiates her case that her husband had knowledge about the entire transaction. Hence, the submission that the complaint could not have been filed through power of attorney holder must fail.

21. It is then submitted that the pre-summoning evidence of power of attorney holder should have been filed. We have no hesitation in rejecting this submission. We have already reproduced the relevant paragraph of the appellant's evidence where she has stated that due to her ill-health, she was unable to come to the court, hence, the complaint was being filed by her power of attorney holder who had knowledge of the transactions. The power of attorney holder's sworn statement was recorded and summons was issued. This exercise cannot be faulted and is in complete accord with Section 200 of the Code. At that stage, the power of attorney holder had stepped in the shoes of the appellant. Otherwise, there was no point in the appellant giving power of attorney to her husband. A.C. Narayanan nowhere states that if the complaint is filed by the complainant through power of attorney holder, the complainant must file affidavit in support of the complaint prior to issuance of summons.

22. It is pertinent to note that in this case, the appellant has examined herself as PW-1 and subjected herself to cross-examination. In the facts of this case, where the sworn statement of her power of attorney holder is recorded at the pre-summoning stage, the argument that she should have also filed a pre-summoning affidavit cannot be entertained. In this connection, we may refer to the judgment of this Court in *Indian Bank Association & Ors. v. Union of India & Ors.*[6] where this Court has given a direction to the Metropolitan Magistrate/Judicial Magistrate to adopt a pragmatic and realistic approach while issuing summons. It is also urged that the power of attorney holder should have also been examined on oath. This submission must also be rejected as apart from being devoid of substance it is clearly aimed at frustrating the prosecution. When the complainant herself has stepped in the witness box, we do not see the need for the power of attorney holder to examine himself as a witness. Law cannot be reduced to such absurdity. The purport of NI Act will be frustrated if such approach is adopted by the courts. We, therefore, reject this submission.

23. Lastly it was urged that the cheques in question were not given for any legally recoverable dues. The cheques were given as a security. The trial court has considered this plea and rejected it. This submission was also advanced before the lower appellate court. But it was rejected by it. The High Court has, however, not dealt with this submission at all though it was raised in the appeal memo. In this connection, we may reproduce relevant portion of letter dated 30/6/2003 addressed by the respondents to the appellant.

“This is further to our letter dated 22/2/2003, I had sought time till 30th June 2003 to return the balance of 7500 shares of Hindustan Lever Limited. However, despite my best efforts I was not in a position to return the shares.

I would earnestly request you to bear with me and allow me to fulfill my commitment to you. I would once again assure you that the full lot of shares due to you would be credited to your account and also the amounts due to you paid in full. As put forth before you personally, I am making every effort to set right the problems that had occurred in my business. This has taken longer than expected.

I would be most grateful if you can consider granting me time till 31st December 2003 to return the 7500 shares to you. I would in the meantime ensure that smaller lots are credited to your account.

I am replacing the cheques issued to you earlier by the following instruments:

a) Cheque No.392942 dt. 1.8.2003 Rs.850,000.00

b) Cheque No.392943 dt. 1.8.2003 Rs.972,000.00 If I fail to return the shares by 31st December, 2003, I agree to your depositing the cheques to recover your dues.

In the case of any eventualities to you, I agree to return these shares to your husband Mr. Sudhir Gulvady or your children Ms. Aparna Gulvady and/or Mr. Gautam Gulvady. I request you to kindly return the cheques issued to you earlier.”

24. On the basis of the averments made in the complaint and on the basis of the above letter, it is contended by learned counsel for the respondents that the above cheques were issued as a security; that there was no crystallized liability or outstanding dues and that there was no legally recoverable debt and, therefore, the complaint was not tenable. On the other hand, it is strenuously contended by the counsel for the appellant that it is abundantly clear from the above letter that the cheques were issued for a crystallized liability or a legally recoverable debt. Since the High Court has not dealt with this submission at all, we deem it appropriate to remand the matter to the High Court for that purpose. Hence, while holding in favour of the appellant that the complaint can be filed by a power of attorney holder and on that ground complaint cannot be held not maintainable and that the power of attorney was very much on record, we remand the matter to the High Court with a request that the High Court should hear both sides and decide whether the cheques in question were issued as a security or for the purpose of repayment of legally recoverable debt. Considering the fact that the complaint is dated 03/03/2004, we request the High Court to decide the above question as

early as possible and preferably within a period of eight months from the date of receipt of our order by it. We make it clear that the remand is only limited to the abovestated question and the scope of remand shall not be extended any further as we have already answered the other questions which were raised before us.

25. The appeals are disposed of in the aforestated terms.

... .. J . (R A N J A N A P R A K A S H D E S A I)
.....J. (N.V. RAMANA) New Delhi;

September 17, 2014.

- [1] 2011 (1) Kar. L.J. 444
- [2] AIR 2014 SC 630
- [3] (2006) 6 SCC39
- [4] (2008) 7 SCC 137
- [5] (2007) 5 SCC 264
- [6] (2014) 5 SCC 590
