

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 13TH DAY OF JANUARY 2023 / 23RD POUSHA, 1944

CRL.MC NO. 8287 OF 2022

AGAINST THE ORDER DATED 2.11.2022 IN CMP.NO.3534/2022 IN
ST 879/2021 OF SPECIAL JUDICIAL MAGISTRATE OF FIRST CLASS

(N.I ACT CASES), KOZHIKODE

PETITIONER/ACCUSED:

RAZAK METHER,
AGED 70 YEARS,
S/O. KUNJUMHAMMED METHER,
KAKKANATTIL HOUSE, SREEMOOLA NAGARAM,
ERNAKULAM, PIN - 685580.
BY ADV RAJIV NAMBISAN

RESPONDENTS/STATE OF KERALA & COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682031.
- 2 E.SARATH KUMAR,
S/O VASUDEVAN, BHAGYA, NELLIKKUNNI, VAYALIL,
N.K.ROAD, NADAKKAVU, KOZHIKODU, REPRESENTED BY
POWER OF ATTORNEY HOLDER UMMER FAROOK MANOLY,
S/O.MOIDEENKOYA,BAIJAS, MAJOR SANTHOSH ROAD,
NADAKKAVU,KOZHIKODE, PIN - 673006.

BY ADVS.

JAGAN ABRAHAM M GEORGW
JAISON ANTONY (K/000076/2017)
PUBLIC PROSECUTOR SRI.G.SUDHEER

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
13.01.2023, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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CrI.M.C.No.8287 of 2022
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Dated this the 13th day of January, 2023

O R D E R

This petition has been filed under Section 482 of the Code of Criminal Procedure (‘Cr.P.C’ for short) with prayer to quash Annexure A4 order and further to quash Annexure A1 complaint and all further proceedings initiated against the petitioner in S.T.879/2021 on the file of Special Judicial First Class Magistrate Court (N.I. Act Cases) Kozhikode.

2. Heard the learned counsel for the petitioner as well as the learned counsel for the 2nd respondent. The learned Public Prosecutor appearing for the State of Kerala also was heard.

3. The learned counsel for the petitioner argued that the dismissal of Annexure-A3 petition filed by the petitioner by Annexure-A4 order is not justifiable. Therefore, Annexure-A4

order is liable to be quashed and in consequence thereof Annexure-A1 complaint and further proceedings initiated against the petitioner in S.T.No.879/2021 are liable to be quashed. The specific point argued by the learned counsel for the petitioner is that in the address portion of Annexure-A1 complaint, it has been averred that the complainant was represented by his power of attorney holder, but there is no mention of this fact in the body of the complaint. Further, Annexure-A1 complaint had to be verified by the power of attorney holder as if he was the complainant. According to the learned counsel for the petitioner, thus Annexure-A1 complaint was filed ignoring the statutory mandates as held in the decision reported in [2013 (4) KLT 21 (SC) : 2013 (4) KLJ 279 : AIR 2014 SC 630 : 2013 SAR (Criminal) 1181], *A.C.Narayanan v. State of Maharashtra & anr.* (hereinafter referred to as “A.C Narayanan first case”).

4. It is argued further that either in the complaint or in Annexure-A2 affidavit filed along with the complaint, nothing stated as regards to direct knowledge of the power of attorney holder regarding the transaction and he had witnessed the

transaction. Decision of this Court reported in [2022 (4) KLT 592], *Shibu v. Neelakantan* also has been placed in this regard.

5. Per contra, it is submitted by the learned counsel for the 2nd respondent that there is absolutely no truth in the contentions raised by the petitioner herein. It is argued that certain relevant documents produced before the trial court were suppressed. Further point argued is that the complainant himself had filed proof affidavit under Section 145 of the Negotiable Instruments Act, as he proposed to give evidence regarding the transaction led to execution of the cheque. Therefore, Annexure-A1 complaint cannot be quashed and any such contention is a matter of evidence to be decided during trial.

6. While appreciating the rival contentions, it is relevant to refer the settled principles in *A.C Narayanan first case*. Following are the legal principles settled by the Apex Court in the above case.

“(i) *Filing of complaint 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 of 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.”

7. It is true that after laying the above principles by the 3

Bench of the Apex Court, the case was again considered by another 2 Bench of the Apex Court. The second judgment in *Narayanan A.C & anr. v. State of Maharashtra & Ors.* is one reported in [2015 (1) KHC 456 : AIR 2015 SC 1198 : 2015 (12) SCC 203] (hereinafter referred to as 'Narayanan A.C second case'). In the said decision, the Apex Court quashed the complaint against the appellant/accused on the following reasons as extracted in para.17 and 18 of the judgment. The same are as under:

“17. From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint. Further, in the list of evidence there is just a mere mention of the words at serial no.6 viz. “Power of Attorney”, however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the respondent no.2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20th February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process.

18. *The appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12th August, 2005.*”

8. It is true that in ***Shibu v. Neelakantan***'s case (*supra*), this Court held that *thus the law is settled on the point that a complaint alleging commission of offence under Section 138 of the Negotiable Instruments Act can be presented through the power of attorney holder and 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 or holder in due course or possess due knowledge regarding the said transaction. 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 had no knowledge regarding the transactions cannot be examined as a witness in the case.

9. Now it is necessary to consider the merits of the contentions raised by the learned counsel for the petitioner at par with the contention raised by the 2nd respondent to ascertain as to whether the present complaint is liable to be quashed. On perusal of the complaint, in the cause title it has been stated that complainant is E.Sarath Kumar, S/o.Vasudevan, represented by his power of attorney holder Ummaar Farook Manoly. The averments in the complaint refer “complainant” and “accused”, after detailing the transaction which led to execution of cheque for Rs.30 lakh dated 02.07.2021. No doubt, the complaint was filed by the power of attorney holder and he put signature in the place of the complainant. But in the list of documents, there is no mention as regards to production of power of attorney. In this matter, as I have already pointed out, the 2nd respondent filed CrI.M.A.No.2/2022 and produced Annexure-R2(a), viz. an agreement in between the complainant and the accused and

Annexure-R2(b), copy of the proof affidavit dated 06.08.2022 filed by the complainant. For the purpose of deciding the matter in controversy, I am inclined to accept these documents by allowing CrI.M.A.No.2/2022.

10. Annexure-A4 in this case is the order in CMP.No.3534/2022 dated 02.11.2022. CMP.No.3534/2022 is a petition filed by the petitioner herein under Section 264 Cr.P.C seeking acquittal of the accused before trial. In this context, it is to be noted that the Magistrate took cognizance in this matter and registered the case as S.T.879/2021 with intention to follow the procedure of summary trial. Section 264 of Cr.P.C deals with judgment in cases tried summarily and it has been provided that in every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. In fact, Section 264 does not provide for acquittal of the accused before trial. Therefore, the petition was found to be defective at the very inception. However, a perusal of the order is necessary to look into the way in which the complaint was filed.

In the order, the learned Magistrate observed while dismissing the petitioner as not maintainable under Section 264 of Cr.P.C that, in this matter the power of attorney in original was produced along with the complaint at the time of its filing itself. The learned counsel for the petitioner placed a latest 3 Bench decision of the Apex Court reported in [2021 (3) KLT 10 (SC)], ***In Re: Expeditious Trial of Cases under Section 138 of N.I Act 1881*** and pointed out the necessity of Section 202 inquiry. In para.24 of the above judgment, the Apex Court held as under:

“1) The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting that of complaints under Section 138 of the Act from summary trial to summons trial.

2) Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.

3) For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.

xxxx xxxx xxxx”

11. Going by the ratio, in cases of an inquiry conducted under Section 202 of Cr.P.C, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. It was held that in a suitable case, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses also. It is true that as per the ratio in *A.C Narayanan first case*, the complaint filed under Section 138 of the Negotiable Instruments Act through power of attorney holder is perfectly legal and competent. But the power of attorney holder could depose and verify on oath before the court in order to prove the contents of the complaint, only when 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 and also 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. If the above stipulations are not

satisfied, the power of attorney could not depose and verify on oath before the court.

12. In the case on hand, the court below took cognizance of the matter acting on the affidavit filed by the power of attorney holder under Section 145 of the N.I Act. But it could be noticed that there is no averments in the complaint that the power of attorney had witnessed transactions as an agent of payee in due course or possess due knowledge regarding the said transaction and also there is no specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint. In fact, the power of attorney holder, who filed the complaint in the present case, could not depose and verify on oath before the court since the affidavit under Section 145 of the N.I Act was filed by the power of attorney holder without the requisites as herein above narrated.

13. In view of the above, the cognizance taken by the Magistrate acting on the affidavit of the power of attorney holder is found to be illegal and the same shall stand set aside. Accordingly, the complaint is reverted back to the pre-cognizance

stage, with liberty to the original complainant to file an affidavit under Section 145 of the N.I Act in his capacity and on such filing the learned Magistrate shall consider fresh cognizance in accordance with law.

The CrI.M.C stands allowed as indicated above.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

APPENDIX OF CRL.MC 8287/2022

PETITIONER'S ANNEXURES

- Annexure A 1 CERTIFIED COPY OF COMPLAINT DATED 18.9.2021. FILED BY 2ND RESPONDENT - S.T.879/2021, BEFORE JFMC-VII, KOZHIKODE.
- Annexure A2 TRUE COPY OF AFFIDAVIT FILED BY P.A.HOLDER (COMPLAINANT) IN S.T.879/2021, BEFORE JFMC-VII, KOZHIKODE. DATED ON: 18.9.2021.
- Annexure A3 TRUE COPY OF C.M.P.NO. 3534/2022 FILED ON 29.8.2022.
- Annexure A4 CERTIFIED COPY OF ORDER IN C.M.P. NO: 3534/2022 DATED 2.11.2022.

RESPONDENTS' ANNEXURES

- Annexure -R(2) (a) TRUE COPY OF THE AGREEMENT DATED 02-01-2021 EXECUTED AND SIGNED BETWEEN THE COMPLAINANT AND THE ACCUSED.
- Annexure -R(2) (b) TRUE COPY OF THE PROOF AFFIDAVIT DATED 06-08-2022 SIGNED AND EXECUTED BY THE COMPLAINANT HIMSELF UNDER SECTION 145 OF NI ACT AS HIS EVIDENCE IN S.T.NO.879/2021 BEFORE THE HON'BLE JUDICIAL FIRST CLASS MAGISTRATE COURT-VII.