

Hamsa Vs. Ibrahim

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Court : Kerala

Decided On : Aug-26-1993

Reported in : [1997]88CompCas800(Ker)

Judge : K.T. Thomas, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138 and 142

Appeal No. : Crl. M.C. No. 486 of 1993

Appellant : Hamsa

Respondent : ibrahim

Advocate for Def. : B. Raman Pillai, Adv.

Advocate for Pet/Ap. : P. Vijaya Bhanu, Adv.

Disposition : Petition dismissed

Judgement :

K.T. Thomas, J.

1. In the rapid proliferation of 'cheque cases' in criminal courts with the introduction of Section 138 and its allied provisions in the [Negotiable Instruments Act, 1881](#) (for short, 'the N. I. Act'), any answer to the question raised in this criminal miscellaneous case may have some impact. The question raised is this : Can the

payee or holder in due course of a cheque file a complaint in the court as per Section 142 of the [Negotiable Instruments Act, 1881](#), through his power of attorney holder

2. Shri P. Vijaya Bhanu and Shri S. Vijayakumar, advocates, argued on opposite positions. A brief statement of facts in this case may be made ; A complaint has been filed in the court of a judicial magistrate of first class for the offences under Section 138 of the [Negotiable Instruments Act, 1881](#), against the petitioner herein as the accused. One Mohammed Syed alias Veeran Haji is the complainant in the case, but the respondent herein (one Ibrahim Hajee) has signed the complaint as power of attorney holder of the complainant. The learned magistrate took cognizance of the offence and issued process to the petitioner. Now the petitioner has come before this court invoking the inherent powers of the High Court envisaged in Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), to have the complaint quashed.

3. Though the petitioner has raised more than one ground in his petition for quashing the complaint, learned counsel for the petitioner has, during arguments, confined himself to one point, that the respondent is only the power of attorney holder of the payee who has no locus standi to file the complaint under Section 138 of the [Negotiable Instruments Act, 1881](#). Counsel contended that the complaint is liable to be dismissed as the magistrate has no jurisdiction to take cognizance of the offence on such a complaint.

4. Under Section 142 of the [Negotiable Instruments Act, 1881](#), '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', notwithstanding anything contained in the Code. The contention is that since the provision debars a court from taking cognizance, of the offence except on a complaint filed either by the payee or by the holder in due course, no complaint can be filed by any other person, be he the agent or holder of a power of attorney

5. Shri P. Vijaya Bhanu contended that if Parliament had intended to permit the agent of a payee or holder in due course to file the complaint, necessary words

would have been employed in the statute for the purpose. The absence of such words in the statute is sufficient indication that . the Legislature did not intend so, contended the counsel. He cited sections 198 and 199 of the Code in support of the contention. As per those provisions, a court is debarred from taking cognizance of certain offences except upon a complaint made by some person aggrieved by the offence concerned. However, special provision is made in both the sections enabling another person to file the complaint on behalf of such aggrieved person under certain circumstances and on certain conditions.

6. Merely because Section 142 of the [Negotiable Instruments Act, 1881](#), does not contain similar provisions as in sections 198 and 199 of the Code, no inference can be drawn that Parliament never intended to allow the complaint to be filed through an agent or power of attorney holder of a payee or holder in due course.

7. In considering the question involved here the legal position regarding the right of a person to appoint another as his agent has to be understood at least in a general manner. According to the law of England ' . . . every person who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right' (vide Jackson and Co. v. Napper [1886] 35 Ch 162). This was recognised as a common law right. Blackburn J. has stated in Queen v. Justices of Kent [1873] 8 QB 305 that ' . . . at common law, when a person authorises another to sign for him, the signature of the person so signing is the signature of the person authorising it'. The Supreme Court has declared in a decision that the law in India is also the same (vide Rao Bahadur Ravulu Subba Rao v. CIT : [1956]30ITR163(SC)), Venkatarama Ayyar J. in the said decision has observed that the said rule is subject to certain well known exceptions such as, when the act to be performed is personal in character, or when the act to be performed is annexed to a public office, or to an office involving any fiduciary obligation. 'But apart from such exception, the law is well-settled that whatever a person can do himself, he can do through an agent' observed the learned judge in the said decision. The above can thus be regarded as the legal position regarding the right to appoint an agent.

'A power of attorney' is the instrument by which a person is authorised to act as the agent of the person granting it (vide Black's Law Dictionary). In Stroud's Judicial Dictionary, power of attorney is described as 'an authority whereby one is set in the turne, stead, or place of another to act for him'. Stone C.) has adopted the said definition as effective and acceptable in Ramdeo v. Lalu Natha, AIR 1937 65. Section 2 of the Power of Attorney Act, 1882, 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. The section declares that everything so done 'shall be as effectual in law as if it had been . . . done by the donee of the power in the name and with the signature ... of the donor thereof' (shorn of words which are not necessary in this context). In the light of such declaration, the legal position is that the power of attorney holder can do everything empowered by the donor and all such acts done by the donee shall have legal recognition and acceptance as though such acts were done by the donor himself.

8. Making a complaint before a court is not an act which would fall within the exceptions envisaged by Venkatarama Ayyar J. in Rao Bahadur Ravulu Subba Rao v. CIT : [1956]30ITR163(SC) . Patanjali Sastri J. (as he then was) had stated in CIT v. Rao Bahadur Ravula Subba Rao, : [1946]14ITR232(Mad) , that Section 2, Power of Attorney Act, cannot override the specific provision of a rule made under a different statute which requires that a particular act should be done by some one 'personally'. The Bench was considering the effect of adding the word 'personally' in rule 6 of the Income-tax Rules framed under Section 59 of the Income-tax Act as per which an application for registration under Section 26A of the Income-tax Act should have been signed by the partner personally. It was the said decision of the Madras High Court which reached the Supreme Court in Rao Bahadur Ravulu Subba Rao v. CIT : [1956]30ITR163(SC) . But the principle enunciated in the said decision has no application to Section 142 of the [Negotiable Instruments Act, 1881](#), since there is no requirement in it that the complaint should be made by the payee or holder in due course 'personally'. Parliament would have advisedly refrained from imposing such a restriction.

9. If a construction is made to the effect that no such complaint as envisaged in Section 142 of the [Negotiable Instruments Act, 1881](#), can be made by a power of

attorney holder on behalf of the payee or holder in due course, its consequence is the following ; Under Clause (b) of the proviso to Section 138 a demand for payment should be made in writing within 15 days of receipt of information regarding dishonour of cheque.

10. Under Section 142, the complaint should be made within one month of the date on which the cause of action arose. If the payee or holder in due course falls ill before the expiry of the said period or if he has to leave the station due to unavoidable reasons the cause of action would die out as the complaint cannot be filed by an agent or a power of attorney holder. It would not be in the interest of justice to construe the provision as containing a restriction that the complaint should be made by the payee or the holder in due course (as the case may be) 'personally'.

11. My attention has been drawn to the unreported decision of a learned single judge of this court (Thulasidas J.) in Criminal Revision Petition No. 209 of 1991 in which the learned judge has stated that 'there is nothing in the Act that the complaint under Section 142 should be filed by the aggrieved person personally ; there are indications in the Act itself to show that steps could be taken to file the complaint on behalf of the aggrieved party'. I am in respectful agreement with the aforesaid view.

12. In the result, I hold that a power of attorney holder of a payee or a holder in due course (as the case may be) can make a complaint under Section 142 of the [Negotiable Instruments Act, 1881](#). No other point has been canvassed before me.

13. Accordingly, I dismiss this criminal miscellaneous case.