

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

561-A Cr.P.C. No. 312/2015 c/w
561-A Cr.P.C. No. 314/2015
561-A Cr.P.C. No. 315/2015
561-A Cr.P.C. No. 316/2015
561-A Cr.P.C. No. 318/2015

Date of order:-28.09.2017

M/S Rishav Enterprises

Vs.

M/S Bhagwati Trading Company.

Coram:

Hon'ble Mr. Justice Sanjay Kumar Gupta

Appearing counsel:

For the Petitioner/Appellant(s) : Mr. Rameshwar Singh Jamwal, Advocate.
For the Respondents(s) : Mr. Sachin Gupta, Advocate.

i/	Whether to be reported in Press/Media	:	Yes/No
ii/	Whether to be reported in Digest/Journal	:	Yes/No

1. In all these five petitions, the petitioner has assailed similar order (Annexure-A) dated 08th June, 2015 passed by the Judicial Magistrate 1st Class, City Judge, Jammu, by which the applications moved by the applicant/accused (petitioner herein) has been dismissed. The petitioner has also assailed the Complaints (Annexure-B) in all the five petitions having different numbers i.e., Complaint Nos. 45, 44, 43, 42 and 41 pending before the learned City Judge, Jammu.
2. The facts giving rise to the filing of all these five petitions briefly stated are that:-
 - (i) The petitioner is the proprietor of M/S Rishav Enterprises, Upper Canal, Bishnah Road, Bari Brahmana, Jammu. The said firm deals in the business of sale/purchase of edible oils of different kinds and the

petitioner firm also used to purchase goods from the respondent firm, which also deals in similar business.

(ii) The petitioner was having a Current Account in UCO Bank, Raghunath Bazar, Jammu and in response to the edible oil supplied by the respondent to the petitioner, the petitioner issued five cheques of the aforementioned Bank, which are:-

S. No.	Cheque No.	Date	Amount
1.	506718	01.11.2009	Rs. 1165859/-
2.	596746	30.11.2009	Rs. 753094/-
3.	596735	22.11.2009	Rs. 725868/-
4.	596747	02.12.2009	Rs. 770960/-
5.	596754	10.12.2009	Rs. 752960/-

The aforementioned cheques were not deposited by the respondents in their Bank Account and after fifteen days from the issuance of the cheques. The payment was made by the petitioner to the respondent by RTGS and nothing remained outstanding against any of the aforesaid cheques.

(iii) The petitioner, who was in good faith within fifteen days from the issuance of the aforesaid five cheques, paid the cheque amount by RTGS and nothing was outstanding against the petitioner with respect to any of the aforesaid cheques and the petitioner asked the respondent to return the aforesaid cheques. Since all the amount had been paid, but the same were not returned by the respondent on the ground that the aforesaid cheques issued had been lost/misplaced and assured that, as soon the cheques are found, they would be returned.

(iv) The respondent with malafide intentions deliberately retained those cheques and after the passage of more than five months, presented the said cheques with his bankers on 04th May, 2010. Since, the petitioner had already paid the cheque amount to the respondent, as such there was no question of his keeping such huge amount in his account and as such, the cheques got dishonored.

(v) The said illegal act of the respondent came to the knowledge of the petitioner when the petitioner was served legal notices by the advocate of the respondent, alleging that the said cheques issued by the petitioner had been dishonored.

(vi) The petitioner approached and contacted the respondent and told him that the aforesaid cheque amount had already been paid to the respondent by RTGS, but the so called attorney of respondent did not agree and failed to give any satisfactory response and on the contrary continued threatening the petitioner that since he is in possession of the cheques and does not want to deal with the petitioner any further, as such, he wants more money and on this, the petitioner was left with no other option, but to get the legal notice replied through his advocate, in which it has been clearly mentioned that the said aforesaid cheque amount stands paid by RTGS.

(vii) Giving practical shape to his threats of extracting money from the petitioner, the respondent filed five criminal complaints against the petitioner under Section 138 of the Negotiable Instruments Act, 1881 read with Section 420 RPC through its so called power of attorney holder, namely, Girdhari Lal Khariwal. The said power of attorney authorized the attorney only to appear before some tax authorities and as such, the complaint was not maintainable, but even then the cognizance was taken and the process was issued. It may also be mentioned that both the

respondent and his power of attorney are not the residents of the State of Jammu and Kashmir and as such could not have got any firm registered in Jammu and Kashmir and this matter also required to be gone into before issuance of any notice and taking of cognizance, but the same was done, which shows the non-application of mind by the Trial Court.

(viii) Since the respondent had filed a totally false, frivolous and concocted complaint under Section 138 of the Negotiable Instruments Act, 1881 in the Court of learned City Judge, Jammu, in which the learned Trial Court without any justification and the power of attorney was also defective, as such, the petitioner initially pointed out the defect to the learned Trial Judge and when his contention was not taken into consideration and application in this regard was dismissed, he filed a petition under Section 561-A Cr. P.C before the Hon'ble High Court and requested for quashment of the proceedings. The Hon'ble High Court, however, did not quash the proceedings, but observed that the petitioner was at liberty to take all legal pleas before the Trial Judge.

(ix) In the meantime, the respondent filed another power of attorney of the proprietor, which had not been authenticated and as such, the petitioner filed another application and asked the respondent to file the requisite power of attorney, which should have been authenticated before the Competent Authority at Jammu, but the learned Trial Judge had dismissed the application vide order dated 08th June, 2015, which order is being challenged by the petitioner by way of the present petitions.

3. The petitioner is also aggrieved of the proceedings having been initiated by the Trial Court on the power of attorney, which are defective and the learned Trial Judge has failed to appreciate the legal position and dismissed the application of the petitioner and as such, the present petitions lie and the Complaints need to be dismissed on this score alone. The petitions are further maintainable because of the following reasons:-

(a) The Complaints filed by the respondent and entertained by the learned Trial Court are unjustified and not maintainable because of the fact that the cheque amount in question allegedly issued by the petitioner has been paid by the petitioner to the respondent by RTGS and also on the ground that the Complaints filed by the respondent are illegal and since the complainant, i.e., respondent herein has no authority to file the present complaints since there is no direct authorization given by the firm to the complainant to file the Complaints in the name of the firm in any Competent Court of law. On this ground that the proceedings initiated in the Complaints by the Trial Court are perverse in nature and, therefore, the same are required to be quashed and the Complaints need to be dismissed.

(b) The entertaining and thereafter, issuing process upon a Complaints by the Trial Court is totally against the provisions of law on the ground that the complainant had not been authorized by the firm to file the Complaints in Competent Court of law, but he had been authorized to engage lawyer and advocates for sale tax and income tax matter of the firm and the Complaints filed by the respondent needed outright dismissal.

(c) The law says that every power of attorney needs to be authenticated and the authentication should have been done before the Competent Authority in Jammu and Kashmir State and as such, the second power of attorney had not legal value and since the first power of attorney was also defective, as such, the Complaints should have been dismissed, but instead of this, the application of the petitioner has been dismissed and as such, the revision petition needs to be allowed.

(d) The firm filing the Complaints is not a legal entity, as both the proprietor and his power of attorney are not the residents of the state of Jammu and Kashmir and could not have formed any firm in Jammu and Kashmir.

(e) The additional or alternate grounds of challenge may be allowed to be urged at the time of hearing.

4. With the afore stated facts and circumstances of the case, learned counsel for the petitioner has prayed that the instant petitions be allowed and order impugned dated 08th June, 2015 passed by the Judicial Magistrate 1st Class, City Judge, Jammu, be set aside and complaints be quashed.
5. Learned counsel for the respondent has filed the objections stating therein that Girdhari Lal S/o Lila Dhar is the law full attorney of the proprietor of the firm and the firm M/S Bhagwati Trading Company is a sole proprietor firm and Gurvinder Singh S/o Baldev Singh the proprietor of the firm. In the objections, it has also been submitted that Gurvinder Singh S/o Baldev Singh has executed two powers of attorneys in favour of Girdhari Lal S/o Lila Dhar. The attorney holder of the proprietor of the firm is looking after the business of the firm since the year 2008 upto till date and he is well aware of the day to day business of the firm and was also the holder of cheque in due course. The very important aspect of the matter, which is required to be noticed is that the present petitioner is approaching the Hon'ble Court for the third time with similar set of contentions. The brief facts of the case, which are required to be noticed are that the respondent is dealing in the business of sale of different kinds of oil and other allied items. The petitioner purchased different kind of oil from the answering respondent to be sold in the market.

6. It has also been submitted in the objections that during the course of business, an outstanding amount of **Rs. 48,91,582/-** (Rupees Forty Eight Lac Ninety One Thousand Five Hundred and Eighty Two) was to be paid on account of the purchase of oil by the petitioner. In order to discharge the debt, the petitioner has drawn five cheques of different amount in favour of answering respondent and the details of the same are given supra. All the aforesaid cheques were drawn from UCO Bank, Branch Raghunath Bazar, Jammu. The cheques were presented by the respondents in their account maintained at different branches at Jammu. All the cheques were dis-honoured with the endorsement ***“Exceed Arrangement”***. The answering respondent after completing the procedural formalities, as prescribed under Negotiable Instrument Act, 1881 filed five Complaints against the petitioner under Section 138 of the aforesaid Act. The Complaints were filed before the learned Chief Judicial Magistrate, Jammu on 1st July, 2010 and were subsequently transferred to the Court of learned City Judge, Jammu on the same day.
7. The learned City Judge, Jammu after recording the preliminary statement of the respondent attorney holder proceeded with the issuance of summons to the petitioner. The trial in all the five cases is at fag end and the trial will be completed within three or four hearings. The petitioner first approached before the Hon’ble High Court through the medium of 561-A Cr.P.C No.18/2012. In the petition, he has taken the identical ground, which has been taken in the present petition. It was averred in the earlier petition that the petitioner has already discharged his debts. The Hon’ble Court while negating the contentions, dismissed the petition with the following observations:-

“It is for the petitioner to substantiate to the respondent before the Court below that he did not make payment of the cheque amount and that the respondent had no cause to file the complaints. This Court in exercise of inherent powers cannot look into the factual aspects of the matter.”

The petition is devoid of merit and is, accordingly, dismissed. However, petitioner would be at liberty to raise all the grounds before the Trial Court and make endeavour to prove whatever is averred in the petition on hand."

8. The petitioner again approached this Hon'ble Court by filing petition under Section 561-A Cr. P.C. No. 419/2014, which was '*dismissed in limine*' by this Hon'ble Court vide order dated 13th November, 2014. It is further submitted that in the petition No. 419/2014, the petitioner has challenged the legality and validity of all the five Complaints, pending before the learned City Judge, Jammu. In the said petition, the petitioner has taken all the grounds, which had been taken in the present petitions. The petitioner again reiterated his plea that he has made the payment against the cheque amounts. The attorney holder is not competent to file the present Complaints etc. The Hon'ble Court vide order dated 13th November, 2014 negated the contentions and dismissed the petition and has finally decided all the grounds, which have been taken by the petitioner in the present petition. The law and the constitutional set up does not provide for a course, which is now being adopted by the petitioner. Once the matter is finally decided, the party is left with very limited courses. First, they can file review, if provided under law or they can approach the next higher forum, as provided by law. Approaching the same Court time and again, who had finally decided the issues, which were raised with certainly amount to abuse of process of law. The Hon'ble Court may dismiss the petition with hefty cost.
9. The main contentions repeatedly raised by the petitioner in the earlier petition and in the present petition are that the outstanding amount, as mentioned above, has been returned by the petitioner through RTGS and second, the attorney holder is not authorized to file the impugned Complaints and also the attorney is not properly authenticated. In this

regard, it is submitted that the issue regarding payment of RTGS has been negated twice and the issue of authorization of attorney is negated in petition No. 419/2014. Hence, the petition is liable to be dismissed.

10. The petitioner has also raised the disputed question of facts in the present petition, which the Hon'ble Court will not like to adjudicate while exercising writ jurisdiction. The petition suffers from '*supperssio-veri*' and '*suggestio-falsi*' and the true facts are not brought into the notice of Hon'ble Court.
11. I have considered the rival contentions of the parties.
12. From the perusal of record, it reveals that five different complaints on the basis of five different cheques issued by petitioner have been filed against petitioner herein for different amount on 01.7.2010 through power of attorney Girdhari Lal Khariwal. In complaints it has been stated that petitioner herein, in lieu of purchase made by him from complainant, cheques were issued of different amounts; the detail is given as under;-

S. No.	Cheque No.	Date	Amount
1.	506718	01.11.2009	Rs. 1165859/-
2.	596746	30.11.2009	Rs. 753094/-
3.	596735	22.11.2009	Rs. 725868/-
4.	596747	02.12.2009	Rs. 770960/-
5.	596754	10.12.2009	Rs. 752960/-

13. That when these cheques were deposited in State Bank of Patila, Gandhi Nagar, Jammu for encashment, all were dishonoured; the complainant then issued legal notice, but no payment was made within stipulated time, so complaints have been filed. JMIC (City Judge ,Jammu) on 1.7.2010 took cognizance and issued notices.
14. Petitioner herein appeared and his statement in terms of Section 242 Cr.P.C. was recorded in all complaints on 17.1.2011; thereafter it appears

that accused was exempted for personal appearance and Advocate Sh. B. D. Sudan was allowed to appear on her behalf; thereafter it further appears that accused moved an application for dropping of proceeding on the ground that Girdhari Lal power of attorney holder was not competent to file complaint in terms of attorney; this application was dismissed on 3.9.2014 on the ground that as per AIR2004SC 182 case titled MMTV V. Medichol Chemical , complaint signed and presented by unauthorized person is no ground to quash the same. The matter was then taken before High Court in petition under section 561-A Cr.P.C ,which was dismissed on 13.11.2014.

15. It further appears that again an application was filed by accused for directing the complainant to file requisite power of attorney; this application was again dismissed on **8.6.2015** on the ground that complainant has already filed fresh attorney duly attested by Notary on 1.8.2013 and in **Jugraj Singh & Anr Vs. Jaswant Singh & Ors.** reported in **AIR 1971 SC 761**, it has been held that the power of attorney attested by Notary would be enough to infer that it has been executed by proper person. It is this order under challenge before this court.
16. In **A.C. Narayanan vs. State of Maharashtra** reported in **2013 (11) SCALE 360**, it is held as under:-

“14) Learned counsel for the respondents met all the contentions which we will discuss hereunder.

15) In terms of the reference order, the following questions have to be decided by this Bench:

(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?

16) In order to find out the answers to the above and also to ascertain whether there is any conflict between the two decisions as pointed out in the referral order, let us consider the factual details and the ultimate dictum laid down in both the decisions.

17) In MMTC (supra), the appellant is a Government of India company. Respondent No. 1 therein is also a company and Respondent Nos. 2 and 3 were the Directors of the respondent-Company. The appellant-Company and the respondent-Company entered into a Memorandum of Understanding (MoU) dated 01.06.1994 and the same was slightly altered on 19.09.1994. Pursuant to the MoU, two cheques were issued by the respondent-Company in favour of the appellant-Company. When both the cheques were presented for payment, the same got returned with an endorsement “payment stopped by drawer”. Two notices were served by the appellant-Company on the respondent-Company. As the amounts under the cheques were not paid, the appellant-Company lodged two complaints through one Lakshman Goel, the Manager of the Regional Office (RO) of the appellant-Company. Respondents therein also filed two petitions for quashing of the complaints. By the impugned order, both the complaints were quashed. In the said case as well as in the cases filed subsequently, the respondents took identical contentions in their petitions in order to quash the complaints, viz., that the complaints filed by Mr Lakshman Goel were not maintainable and that the cheques were not given for any debt or liability. In the impugned judgment, it was held that the complaints filed by Mr Lakshman Goel were not maintainable. The High Court held that it is only an Executive Director of the Company who has the authority to institute legal proceedings. While holding that the reasoning given by the High Court cannot be sustained, this Court held that [Section 142](#) of the N.I. Act provides that a complaint under [Section 138](#) can be made by the payee or the holder in due course of the said cheque. This Court further held that the complaints in question were by the appellant-company who is the payee of the two cheques. After finding that the Court cannot quash a complaint as stated by the High Court, this Court set aside the same and directed the trial Court to proceed with the complaints against Respondent Nos. 1 and 3 therein in accordance with law.

18) Now, let us consider the later decision of this Court in *Janki Vashdeo Bhojwani* (supra). This case relates to powers of Power of Attorney under [the Code](#) of Civil Procedure, 1908 and it was concluded that a complaint by a power of attorney holder on behalf of original plaintiff is maintainable provided he has personal knowledge of the transaction in question. This Court further held as under:

“12. In the context of the directions given by this Court, shifting the burden of proving on to the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power-of-attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to “act” on behalf of the principal. In our view the word “acts” employed in Order 3 Rules 1 and 2 CPC confines only to in respect of “acts” done by the power-of-attorney holder in exercise of power granted by the instrument. The term “acts” would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some “acts” in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.” This Court further held thus:

“17. On the question of power of attorney, the High Courts have divergent views. In the case of [Shambhu Dutt Shastri v. State of Rajasthan](#) it was held that 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 the 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 in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of [Ram Prasad v. Hari Narain](#). It was held that the word “acts” used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only 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. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of **Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias the Goa Bench of the Bombay High Court** held that a power of attorney can file a complaint under **Section 138** but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of **Humberto Luis v. Floriano Armando Luis** on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word “act” appearing in Order 3 Rule 2 CPC takes within its sweep “depose”. We are unable to agree with this view taken by the Bombay High Court in **Floriano Armando**.

21. We hold that the view taken by the Rajasthan High Court in the case of **Shambhu Dutt Shastri** followed and reiterated in the case of **Ram Prasad** is the correct view. The view taken in the case of **Floriano Armando Luis** cannot be said to have laid down a correct law and is accordingly overruled.”

19) As noticed hereinabove, though **Janki Vashdeo Bhojwani (supra)**, relates to powers of Power of Attorney holder under CPC but it was concluded therein that a plaint by a Power of Attorney holder on behalf of the original plaintiff is maintainable provided he has personal knowledge of the transaction in question. In a way, it is an exception to a well settled position that criminal law can be put in motion by anyone [vide **Vishwa Mitter (supra)**] and under the Statute, one stranger to transaction in question, namely, legal heir etc., can also carry forward the pending criminal complaint or initiate the criminal action if the original complainant dies [Vide **Ashwin Nanubhai Vyas vs. State of Maharashtra (1967) 1 SCR 807**]. Keeping in mind various situations like inability as a result of sickness, old age or death or staying abroad of the payee or holder in due course to appear and depose before the Court in order to prove the complaint, it is permissible for the Power of Attorney holder or for the legal representative(s) to file a complaint and/or continue with the pending criminal complaint for and on behalf of payee or holder in due course. However, it is expected that such power of attorney holder or legal representative(s) should have knowledge about the transaction in question so as to be able to bring on record the truth of the grievance/offence, otherwise, no criminal justice could be achieved in case payee or holder in due course, is unable to sign, appear or depose as complainant due to above quoted reasons. Keeping these aspects in mind, in **MMTC (supra)**, this Court had taken the view that if complaint is filed for and on behalf of payee or holder in due course, that is good enough compliance with **Section 142** of N.I. Act.

20) The stand of the appellant in Criminal Appeal No. 73 of 2007 is that no complaint can be filed and no cognizance of the complaint can be taken if the complaint is by the power of attorney holder, since it is against Section 200 of the Code and deserves to be rejected. There is no dispute that complaint has to be filed by the complainant as contemplated by Section 200 of the Code, but the said Section does not create any embargo that the attorney holder or legal representative(s) cannot be a complainant.

21) The power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal.

22) From a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 of the Code, 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 N.I. Act. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

23) In the light of the discussion, we are of the view that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under [Section 138](#) of the N.I. Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant-payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. On this count, the fourth question becomes infructuous.

24) In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the “payee”; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.

25) Similar substantial questions were raised in the appeal arising out of S.L.P (Crl.) No. 2724 of 2008, which stand answered as above. Apart from the above questions, one distinct query was raised as to whether a person authorized by a Company or Statute or Institution can delegate powers to their subordinate/others for filing a criminal complaint? The issue raised is in reference to validity of sub-delegation of functions of the power of attorney. We have already clarified to the extent that the attorney holder can sign and file a complaint on behalf of the complainant-payee. However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub- delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

26) While holding that there is no serious conflict between the decisions in MMTC (supra) and Janki Vashdeo Bhojwani (supra), we clarify the position and answer the questions in the following manner:

(i) Filing of complaint petition under [Section 138](#) of N.I 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 N.I 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 N.I 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 N.I. 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.

27) We answer the reference on the above terms and remit the matter to the appropriate Bench for deciding the case on merit.”

17. In present case from the perusal of record, it is further evident that the fresh general power of attorney executed by Complainant-Company before Notary Shri Ganga Nagar on 3.9.2014, has authorised the attorney to represent him before any Court of law etc. The ground taken that attorney has not been authenticated, is not tenable.
18. [Section 57\(6\)](#) of Evidence Act provides that the Court shall take judicial notice of all the seals of which English Courts take judicial notice and the seals of Notary Public. Under [Section 85](#) of the Indian Evidence Act, the Court shall presume that every document purporting to be Power of Attorney, which has been duly executed before and authenticated by Notary Public can be taken to have been so executed and authenticated.

19. Court below has relied upon AIR 1971 SC 761 in case titled **Jugraj Singh & Anr. vs Jaswant Singh & Ors**, wherein it is held as under:

"7. The short question in this case is whether Mr. Chawla possessed such a power of attorney for executing the document and for presentation of it for registration. Now, if we were to take into account the first power of attorney which was executed in his favour on May 30, 1963, we would be forced to say that it did not comply with the requirements of the law and was ineffective to clothe Mr. Chawla with the authority to execute the sale deed or to present it for registration. That power of attorney was not authenticated as required by Section 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public. The document only bore the signature of a witness without anything to show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. The second power of attorney however does show that it was executed before a proper Notary Public who complied with the laws of California and authenticated the document as required by that law. We are satisfied that that power of attorney was also duly authenticated in accordance with our laws. The only complaint was that the Notary Public did not say in his endorsement that Mr. Chawla had been identified to his satisfaction. But that flows from the fact that he endorsed on the" document that it had been subscribed and sworn before him. There is a presumption of regularity of official acts and we are satisfied that he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. This makes the second power of attorney valid and effective both under [Section 85](#) of the Indian Evidence Act and Section 33 of the Indian Registration Act."

20. In **Citibank N.A., New Delhi vs Juggilal Kamlatpat Jute Mills Co. Ltd.** reported in AIR 1982 Delhi, wherein it is held as under:-

"20. [Section 85](#) of the Evidence Act reads as under : "Presumption as to powers of attorney. - The court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any court, judge, magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated."

21. For raising a presumption under this section, the twin requirements to be fulfilled are : (1) that the document in question must purport to be a power of attorney, and (2) that it must purport to have been executed

before and authenticated by a notary public, or any court, judge, magistrate, Indian consul, or vice-consul, or representative of to Central Government. Exhibit P-42A is a document which purports to be a power to be a power of attorney. It further purports to have been executed before and authenticated by a notary public. Thus, both these requirements stand fulfilled and there is no dispute to this extent.”

21. In **National & Grindlays Bank v. Radio Electronics Corporation P. Ltd. [1978] RLR 217**, after detailed discussion, Gill J., upon examining the various authorities and meaning of the word "authentication", held as under:-

"In my view [section 85](#) (of [Evidence Act](#)) does not draw any distinction between the kind of documents, viz : Power of attorney executed by an individual and the one executed on behalf of a company. Authentication of any of these instruments by a notary public raised a legal presumption that the same has been duly executed and the person or persons, who had executed, had the authority to do so. Undoubtedly, such a presumption is not conclusive, being rebuttable. The other party is, therefore, legally entitled to disprove such a presumption. The reason to incorporate such a provision is quite obvious. Its inclusion is intended to obviate the production of evidence as is other wise enjoined to prove the execution of the document. Embarking on an inquiry and demanding proof about the authority of the executant would frustrate the very purpose for which [section 85](#) has been engrafted. Moreover, asking for proof would have far reaching consequences. Apart from entailing delay and unnecessary expense, it would also hamper the entire trade, more particularly trade. Thus, the interpretation placed by the learned counsel for the defendants does not reflect or effectuate the real legislative intention. It, on the other hand, unwarrantedly restricts and whittles down the true meaning and legitimate scope of an unambiguous provision."

22. It would be thus seen from all the aforesaid judicial pronouncements that the Courts have been consistently taking a view that once the execution and authentication of the Power of Attorney by a Notary Public is proved on record, then Section 85 mandates the Court to draw a presumption in favour of due and valid execution of such a Power of Attorney. The Courts have also taken a view that the use of expression "authentication" in Section 85 of the Evidence Act must be accorded its due meaning, not merely comparing the same with the expression "attestation". The authentication of a Power of Attorney or any document by the Notary

Public necessarily would mean that Notary Public has duly satisfied himself about the competence of the Officer and his authority to execute such a Power of Attorney or other document. The purpose of Section 85 has thus been rightly held to eliminate the cumbersome evidence which in the absence of the said provision on the statute book would be required to prove the minutes book and Board Resolution etc. for proving the due and valid execution of the Power of Attorney. Looking into the growing international trade and the world economy, any other interpretation of Section 85 of the Evidence Act would unnecessarily burden the parties to bring the witnesses from outside state. Once a party who seeks to take advantage of Section 85 of the Evidence Act proves the Power of Attorney, its due execution and authentication by the Notary Public with due affixation of necessary seals on such a document then the onus would shift on the other party to disprove or rebut such a presumption arising in favour of the first party.

23. Other grounds taken that all the amount had been paid, but cheques were not returned by the respondent on the ground that the aforesaid cheques issued had been lost/misplaced and assured that, as soon the cheques are found, they would be returned; that there was no question of his keeping such huge amount in his account and as such, the cheques got dishonoured; that said illegal act of the respondent came to the knowledge of the petitioner when the petitioner was served legal notices by the Advocate of the respondent, alleging that the said cheques issued by the petitioner had been dishonoured; that petitioner approached and contacted the respondent and told him that the aforesaid cheque amount had already been paid to the respondent by RTGS, but the so called attorney of respondent did not agree and failed to give any satisfactory response and on the contrary continued threatening the petitioner that since he is in possession of the cheques and does not want to deal with

- (Sanjay Kumar Gupta)**
Judge

Jammu,
28.09.2017
Ram Krishan