IN THE HIGH COURT OF JUDICATURE AT BOMBAY, BENCH AT AURANGABAD

CRIMINAL APPEAL NO.: 76 OF 2003

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Sow. Laxmibai Sakharam Misal,
Age: 40 years, Occ.: Agri.,
R/o Fulkalas through Power of
Attorney holder Mr. Sakharam
Bapurao Misal, Age: 42 years,
Occu.: Agriculture & Service,
R/o Fulkalas, Taluka: Purna,
District: PArbhani, Shankar
Nagar, Behind Shivaji College,
Parbhani. ... **APPELLANT**
[ORIG.COMPLAINANT]

VERSUS

Raosaheb Pandurang Kale,
Age: 42 years, Occu.: Business,
Prop. Kale Brothers, R/o
Stadium Complex, Parbhani. ... **RESPONDENT**
[ORIG. ACCUSED]

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Mr. P. P. Kothari, Advocate h/f Mr. S. S. Bora, Advocate for the Appellant.
Mr. Ajinkya Reddy, Advocate h/f Mr. Y. M. Game, Advocate for Respondent.

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CORAM:- T. V. NALAWADE, J.
DATED:- 31st JULY, 2015.

JUDGMENT:

1. The appeal is filed against the judgment and order of acquittal of S.C.C. No.4564 of 2000 which was pending in the Court of learned J.M.F.C., Parbhani. The learned J.M.F.C.

has acquitted the Respondent in a private complaint filed under section 138 of Negotiable Instruments Act by the appellant. Both the sides are heard.

2. The complainant Smt. Laxmibai and accused Raosaheb are close relatives. It is the case of the complainant that the accused was in need of money as he wanted to purchase a flat and so he had asked for hand loan of Rs.2.5 Lakh. He wanted this money for a period of three months. It is contended that due to the relationship, the complainant gave a hand loan of Rs.2.5 Lakh and the accused assured to return the money within three months. It is contended that the cheque of similar amount bearing No.786784 drawn on Marathwada Gramin Bank branch Asola was given by accused for repayment of loan and it was a post dated cheque.

3. It is the case of the complainant that when the amount was not paid she presented the cheque for encashment and the cheque bounced with the remark that there was instruction/ direction from the account holder to stop the payment. After issuing the statutory notice the complaint came to be filed.

4. The accused pleaded not guilty. Both the sides

examined witnesses. The accused had given reply to the statutory notice and he had taken the defence that his cheques were stolen by somebody from his shop and he had already informed to his bank that his five cheques, including the cheque in question, were missing and payment should not be made on the basis of those cheques. The accused denied that he had taken the hand loan from the complainant.

5. The husband of the complainant, holding general power of attorney, filed the complainant and he gave the evidence. One witness like a Branch Manager of the bank of the accused was examined to prove that the cheque had bounced due to directions given by the accused. On the other hand, the accused examined bank officers of two banks to show that the complainant and her son had taken cash credit loan from these two banks and at the relevant time they were defaulter and they were not in a position to give such loan to the accused.

6. In the statutory notice, no particulars like the day, date, month of giving of the hand loan were given and for first time in the complaint such particulars were given. It is specific case of the complainant that a post dated cheque

was given to her. The cheque bears the date as 22nd August, 2000. In the evidence of the witness examined by complainant, like Chandrakant (PW2), it is brought on the record that the accused had informed to this bank on 21st July, 1998 that his five cheques were missing and they were probably stolen and he had put only signature on the cheques. He had requested the bank not to honour the cheques. Another letter dated 30th September, 1999 was given and even before presentation of the cheque the third letter dated 30th June, 2000 was given. The 4th letter was given on 30th September, 2000 and it can be said that the 4th letter was given after presentation of the cheque and when the cheque was dishonoured (Exhibit-46 and Exhibit-49). The evidence on record shows that the cheque book was given to the accused by his bank in the year 1998 and he had immediately informed the bank that the cheque in question and 4 more cheques were missing. In view of this record and the substantive evidence, which cannot be disputed, the case of the complainant that the hand loan was given in the year 2000 and for repayment of the hand loan the cheque was given by the accused has become doubtful.

7. The two Branch Managers like Bapurao (D.W.1) and Biharilal (D.W.2) have given evidence that the complainant and her son had taken cash credit loan from their bank but both were defaulters at the relevant time. The cash credit of Rs.75,000?- was given to the complainant and the cash credit of Rs.1 Lakh was given to her son for grocery business. In view of these circumstances, it was necessary for the complainant to show that she had the resources to give amount of Rs.2.5 Lakh in the month of May, 2000. No such record is produced and ordinarily an agriculturist, a lady like the complainant, does not keep such cash amount in the house. These circumstances have also created doubt about the case that the amount was given in May, 2000 and against that amount the cheque in question was given.

8. One more point was argued by learned counsel for the accused, and that is the evidence given by power of attorney holder. He placed reliance on the case reported as ***AIR 2014 S.C. 630 [A.C.Narayanan V/s State of Maharashtra and Another]***, a Bench of 3 Judges of Apex Court has discussed the law developed on the point of use of power of attorney holder in a criminal case filed under

section 138 of Negotiable Instruments Act. The law is summarised at para No.26 which reads as under:

> *"26. While holding that there is no serious conflict between the decisions in MMTC (AIR 2002 SC 182 : 2001 AIR SCW 4793) (supra) and Janki Vashdeo Bhojwani (AIR 2005 SC 439 : 2004 AIR SCW 7064) (supra), we clarify the position and asnwer the questions in the following manner:*
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> *(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.

9. In the present matter, neither in the statutory notice nor in the complaint it is contended that the husband of the complainant had personal knowledge regarding the transaction. On the contrary, the husband has admitted in the cross examination that he does not know as to when the amount was given by his wife. In view of these circumstances, it cannot be said that there is evidence of a person who has knowledge about the transaction between the accused and the complainant.

10. The learned counsel for the complainant placed reliance on one case reported as ***2010 (1) Bom. C.R. (Cri.) 737 (Nagpur Bench) "Gaurav Omprakash Jaju V/s Shakti Fabrics"***. The defence is taken by the accused, in the present case, that the cheques were stolen. In view of the facts and circumstances of the reported case, this Court had held that such defence was not acceptable. The facts and circumstances of of each and every case are always different. There is other convincing material for such defence taken by the accused in the present matter. Thus, the observations made by this Court in the reported case are of no use for the complainant in the present matter.

11. The view taken by the trial Court is possible view and no other view is possible in view of aforesaid discussion.

12. In the result, appeal stands dismissed.

[T. V. NALAWADE, J.]

Dated:31/07/2015.
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