IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.805 OF 2009

BHUPESH RATHOD)...APPELLANT

V/s.

DAYASHANKAR PRASAD CHAURASIA & ANR.)...RESPONDENT

Mrs.Kavita Pawar, Advocate for the Appellant.

Mr.Amar Bhatt i/b. Rakesh Tripathi, Advocate for Respondent No.1.

Mr.Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 3rd AUGUST 2015.

ORAL JUDGMENT :

1 The appellant is the original complainant. He had filed a complaint against respondent no.1 herein, alleging commission of an offence punishable under Section 138 of the Negotiable Instruments Act (N.I.Act hereinafter). After holding a trial, the Special Metropolitan Magistrate, Mumbai, found

respondent no.1 not guilty and passed an order of acquittal. Being aggrieved thereby, the appellant has, after obtaining special leave of this court, filed the present appeal praying that the order of acquittal be set aside and respondent no.1 be convicted.

2 I have heard Mrs.Kavita Pawar, the learned counsel for the appellant. I have heard Mr.Amar Bhatt, the learned counsel for respondent no.1.

3 For the sake of convenience and clarity, the appellant shall hereinafter be referred to as 'the complainant' and respondent no.1 as 'the accused.'

4 The accused had issued eight cheques in favour of M/s.Bell Marshall Tele System Limited. These cheques, though were drawn on different dates, were presented for payment on 10th May 2006. All were dishonoured. Since, even after making a demand, the amount of the cheques was not paid, the complaint came to be filed.

5 The learned counsel for the appellant took me through the evidence adduced during the trial and the impugned judgment, and contended that the reasoning of the learned Magistrate leading to acquittal cannot be accepted. Though there is some substance in this contention, in my opinion, the prosecution of the accused itself was bad. It is because, it is difficult to hold that the complaint in the instance case had been filed by the payee or the holder in due course. In view of Clause (a) of Section 142 of the N.I.Act, the cognizance of an offence punishable under Section 138 of the N.I.Act can be taken only upon a *complaint made by the payee, or the holder in due course of the cheque/s*.

6 All the cheques were favouring 'M/s.Bell Marshall Tele System Limited.' The complainant's case is that M/s.Bell Marshall Tele System Limited is a Company incorporated under the Companies Act. Company, being a juristic person, has a separate and distinct identity, apart from its directors. The *payee* was the company. If the complaint, as filed, is seen, it does not appear to have been filed by the Company. The complaint has been filed by the complainant in his name, and though he has given his description as the 'Managing Director of M/s.Bell Marshall Tele System Limited', it is difficult to spell out from the complaint, that the same had been filed by the said Company.

7 In the introductory part of the complaint also, the complainant has described himself as the complainant, and has not described the Company as the complainant. In paragraph 1 of the complaint, the complainant has kept vague, as to in whose favour the cheques were issued by the accused. The relevant part of the first paragraph of the complaint reads as under :

> 1. I say that in due consideration and against legal enforceable liability of the sum of Rs.1,60,000/- (Rupees One Lakh Sixty Thousand Only) accused have issued eight cheques as under :-

Sr.	Cheque	Date	Amount in Rs.	Drawn on	
1.	660694	10.3.2006	20,000/-	HDFC Bank Ltd. Vasai(E) Branch	
2.	660695	10.2.2006	20,000/-	,,	,,
3.	660688	10.2.2006	20,000/-	,,	,,
4.	660689	10.5.2006	20,000/-	,,	,,
5.	660690	10.5.2006	20,000/-	,,	,,
6.	660691	10.4.2006	20,000/-	,,	,,
7.	660692	10.4.2006	20,000/-	,,	,,
8.	660693	10.3.2006	20,000/-	,,	,,

Thus, there is no mention that the cheques were issued favouring the Company. This aspect, apparently, has been kept vague by the complainant. In the body of the complaint also, it is not mentioned that the complaint is being filed by the Company, and that, the defacto complainant, being its Managing Director or an authorised representative, was filing the same on behalf of the Company.

8 The learned counsel for the appellant submitted that the complainant's case may not be thrown out on such technicality, and therefore, I have examined the record of the case. I find from the demand notice that the same has been made on behalf of the Company M/s.Bell Marshall Tele System Limited. When the Company was aware of this position, that being payee, the Company itself was required to file the complaint, why the complaint was not filed in the name of the Company, is not clear.

9 It is difficult to hold that this is simply an oversight or a mistake, and the possibility that the complainant wanted to keep this aspect of the matter rather vague, cannot be ruled out. This is particularly so, because, it does not appear to be the business of the Company to advance loans on interest. As per the case made out in the complaint, the transaction was a loan transaction. It is not clear whether the Company was authorized to do the business of advancing loan with interest. The possibility, of the complaint not having been filed in the name of the Company keeping this aspect in mind, therefore, cannot be ruled out.

10 Though the entire reasoning of the learned Magistrate cannot be accepted, in the ultimate analysis, it must be held that, the complaint had not been filed by the *payee* or the *holder* in due course of the cheques in question. Section 142 of the N.I.Act leaves no manner of doubt that a complaint in respect of an offence punishable under Section 138 thereof, would be maintainable only if it is filed by a *payee* or the *holder in due course.*

11 In this view of the matter, I do not wish to interfere with the finding of acquittal recorded by the learned Magistrate.

12 The Appeal is dismissed.

(ABHAY M. THIPSAY, J.)