

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.4676 OF 2014

M/s. Scrap Steel Pvt. Ltd.

...Petitioner

Versus

State of Maharashtra & Anr.

...Respondents

.....

Mr. Amol Deshpande for the Petitioner.

Mr. Ashok Bhatia for the Respondent No.2

Ms R.V. Newton, APP for Respondent No.1 – State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATE : 14th SEPTEMBER, 2015.

P. C. :

1. By this petition, the Applicant, who is an accused in C.C. No.2638/SS/2012 under section 138 of the Negotiable Instruments Act, has challenged the order dated 29.10.2014 passed by learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, rejecting his objections for examination of the complainant as a witness in the said case.

2. The learned counsel for the Petitioner has submitted that the complaint under section 138 of the Negotiable Instruments Act was filed by the complainant through its Power of attorney. The said Power

of Attorney filed his affidavit-in-evidence and was duly cross-examined. Subsequent to the evidence of the power of attorney, the respondent no.2 / complainant sought to examine himself as a witness and also sought to produce certain documents, which were not produced through the power of attorney. The said application was granted by the learned Magistrate by order dated 29.10.2014, aggrieved by which, the petitioner accused has filed the present petition.

3. Learned counsel for the petitioner submits that allowing the Respondent No.2 /complainant to be examined as a witness would only enable him to fill in the lacunae. Whereas the learned counsel for Respondent No.2 has submitted that the power of attorney has deposed only as regards the facts which were within his knowledge and that the complainant / Respondent No. 2 is entitled to depose in respect of the facts which were within his exclusive knowledge. He has further submitted that the Respondent No.2 /complainant had sought to produce documents viz. challans, Acknowledgments, ledger account, confirmation of account, etc. which were exclusively within the knowledge of Respondent No.2. He has, therefore, submitted that failure to adduce the said relevant evidence would result in depriving the respondent no.2 / complainant from adducing material evidence.

He has placed reliance on judgments of the Apex Court in *Janki V. Bhojwani & Anr, AIR 2005 SCC 439* and *M/s. Shankar Finance & Investments Vs. State of Andhra Pradesh & Ors. AIR 2009 SCC 422*.

4. I have considered the submissions advanced by the respective Counsels. At the outset, it may be mentioned that in the case of *M/s. Shankar Finance & Investment (Supra)*, the Apex Court after referring to the principles laid down in the *Janki V. Bhojwani (Supra)* has held as under :-

“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 terms 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 he 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. (emphasis supplied)

The principle underlying the said observations will apply to cases under section 138 of the Act. in regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney

holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney holder has signed the complaint, it will be absurd to say that he should not be examined under section 200 of the Code, and only the Secretary of the Company or the partner of the firm or the proprietary of a concern, who did not have personal knowledge of the transaction, should be examined. Of course, where the cheque is drawn in the name of the proprietor of a proprietary concern, but an employee of such concern (who is not an attorney holder) has knowledge of the transaction the payee as complainant and the employee who has knowledge of the transaction, may both have to be examined. Be that as it may. In this case we find no infirmity. ”

5. In the instant case the complaint was filed by the power of attorney. He has deposed as a witness in respect of the facts which were within his personal knowledge. The affidavit filed by Respondent No./ complainant reveals that he has sought to examine himself in respect of the facts and certain documents, which were exclusively within his knowledge. In view of the principles laid down by the Apex Court in M/s. Shankar Finance & Investments V. State of Andhra Pradesh & Ors., in my considered view, the respondent no.2 is entitled to depose in respect of the facts which are exclusively within his knowledge. The respondent no.2 / complainant cannot be precluded from adducing such evidence on an assumption that he is trying to fill

in the lacunae, as it is for the Magistrate who is the master of his Court to exercise his jurisdiction judiciously and ensure that the evidence is recorded in accordance with law.

6. Under the circumstances, the petition is dismissed.
7. Both the parties to appear before the trial court on **21.9.2015**.

(ANUJA PRABHUDESSAI, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment /order.