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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.33 OF 2015

Mr. Mahesh Revankar
son of Gurudas Revankar,
major, residing at H.No.188/4
Fontainhas, Mala, Ilhas-Goa. ... Appellant.

Versus

1. Mr. Kalidas Kashinath Raikar
son of Kashinath Raikar,
major, residing at K.K. Villa,
Ward No. 2, Alto Duler
Mapusa, Bardez Goa.
2. State
Through Public Prosecutor
High Court of Bombay at Goa. ... Respondents.

WITH

CRIMINAL MISC. APPLICATION NO.640 OF 2021 (F)

IN

CRIMINAL APPEAL NO.33 OF 2015

Mr. Kalidas Kashinath Raikar & Anr. ... Applicants.

Versus

Mr. Mahesh Revankar ... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Mr. Sarvesh Sawant,
Advocate for the Appellant.

Mr. S.S. Kantak, Senior Advocate with Mr. Preetam Talaulikar,
Mr. Arjun Naik and Ms. Mehendi Naik, *Advocates for*
Respondent No.1.

Mr. Mahesh Amonkar, Additional Public Prosecutor *for*
Respondent No.2.

CORAM : R.N. LADDHA, J.
RESERVED ON : 17 February, 2022
PRONOUNCED ON : 13 June, 2022

JUDGEMENT:

The appellant, who was the original complainant in Criminal Case No.OA/354/2011/C on the file of the Judicial Magistrate, First Class, 'D' Court, Panaji, is aggrieved by the dismissal of his complaint and acquittal of the respondent no.1 of the offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as “the Act” for short).

2. The allegation in the complaint was that the respondent-accused and his wife falsely represented the complainant that they were the absolute owners and possessors of the land bearing Survey No.16/8,

admeasuring 2365 sq. mts. of Village Nachinola and induced them to purchase the same. Accordingly, on 04.09.2010, an agreement to purchase the said land was executed and as a part of consideration, an amount of ₹25,00,000/- was paid to the accused and his wife. Thereafter, the accused and his wife failed to comply with the terms of the said agreement and also defaulted in making the repayment of the said amount within the agreed period. It is further the case of the complainant that the major part of the said land was in possession of one Mr. Jagdish Patel, who, in fact was running a Saw Mill thereon and accused had also taken money from him by agreeing to sell the same land to him. The complainant thereupon immediately contacted the accused and his wife and warned them that appropriate legal action would be initiated against them in case they do not fulfill their promise of returning the amount along with interest. The accused then requested the complainant to refrain from resorting to any such acts and promised to pay as per the terms of the agreement to the complainant the sum of ₹32,00,000/- being refund of sum of ₹25,00,000/- with interest accrued thereon and accordingly issued a cheque for ₹32,00,000/-, in the name of his sole proprietary concern Zenith Constructions, which is the subject matter of the present case.

3. On presentation, the said cheque was returned dishonoured with the remark "funds insufficient". Payment was not made despite demand through statutory legal notice dated 15.10.2011, and ultimately the complaint in question was filed on 08.12.2011 before the Trial Court in respect of the disputed Cheque No. 574324 dated 03.10.2011 of ₹32,00,000/-.

4. In the cross examination of the complainant, execution of the agreement dated 04.09.2010 was not denied nor the fact of receipt of the amount of ₹25,00,000/-. The fact of issuance of statutory notice and receipt of the same by the accused was also not denied. It was suggested in the cross examination of the complainant that the accused had given a blank cheque but it was as a security and not to meet any legal liability and that the money was given as loan. As such, the accused had admitted his signature on the cheque and the execution of the cheque. Therefore, the presumptions under Sections 118 and 139 of the Act were attracted. Merely suggesting to the complainant that the cheque was given as security is not sufficient to rebut the statutory presumption which is in favour of the complainant. The agreement dated 04.09.2010 executed between the accused, his wife and the complainant does not speak of any cheque being given as security.

Moreover, accused did not step into the witness box in support of his statement. On the contrary, the accused in his statement under Section 313 of the Code of Criminal Procedure, 1973 admitted that the complainant was induced by him and his wife to advance a sum of ₹25,00,000/- by misrepresentation and thereby he cheated the complainant. The accused further admitted in his statement under Section 313 of Cr.P.C. that he and his wife falsely represented to the complainant that they were absolute owners in exclusive possession of the plot of land bearing Survey No.16/8 of Village Nachinola, Bardez, Goa, which was free from any encumbrances and which representation were false to his knowledge. The evidence with regard to payment advanced to the accused, dishonouring of the cheque in question for want of funds and issuance of receipt of the statutory notice was found to be adequate.

5. The only reason for acquitting the accused was the fact that the cheque stood in the name of “Zenith Constructions” and the complainant was not the said business concern, but an individual. Mr. S.S. Kantak, the learned Senior Counsel appearing on behalf of the accused–respondent submitted that the complainant–appellant was wholly incompetent to lodge the prosecution as the cheque was issued

in the name of Zenith Constructions but complaint was filed by the appellant in his personal capacity and nowhere in the cause title or in the complaint he had stated that he is the sole proprietor of Zenith Constructions nor any documentary evidence was brought on record to show that the complainant in fact was the sole proprietor of Zenith Constructions. Section 142 of the Act provides that the complaint under Section 138 can be filed by the payee or the holder of the cheque in due course. In the instant case, according to Mr. Kantak, the learned Senior Counsel, it is evident that “Zenith Constructions”, was the payee and that the appellant cannot claim to be the payee of the cheque, nor can he be the holder in due course, unless he had established that he was the sole proprietor of the said concern and therefore, he himself was the payee and thus, entitled to the encashment of the cheque in question. In his view, a mere statement in the affidavit-in-evidence in this regard is not sufficient to establish the fact that the complainant was the sole proprietor of Zenith Constructions. No documentary evidence was placed on record to show that the complainant, in fact, was the sole proprietor of Zenith Constructions. Reliance has been placed on *Milind Shripad Chandurkar vs. Kalim M. Khan and Anr.*¹

¹ (2011) 4 SCC 275

6. It is settled position of law that a proprietary concern is not an independent juridical entity, apart from its proprietor. On perusal of the record including the evidence led by the parties, it is seen that the complainant, in the body of the complaint as also in the evidence, had categorically stated that he was the sole proprietor of M/s Zenith Constructions, which averments were not denied by the accused in the cross examination nor had he replied to the statutory notice issued by the complainant. However, it is also seen that absolutely no documentary evidence has been placed on record by the complainant to establish that he is the sole proprietor of “Zenith Constructions” which was a proprietary concern.

7. The Trial Court has dealt with the issues elaborately and recorded the following findings:

“22. As per section 138 and 142 of the Negotiable Instruments Act the complaint can be filed by the payee of the cheque or the holder in due course. The cheque in this case is produced at exh 18. The cheque is drawn in the name of Zenith Constructions. However the complaint is filed by Mahesh Revankar in his personal capacity and nowhere in the cause tile or in the complaint has he stated that the complaint is filed by him as the sole proprietor of Zenith Constructions.

24. As the cheque in the present case is drawn in favour of Zenith Constructions the complaint ought to have been filed by the complainant as the proprietor of Zenith Constructions or Zenith Constructions represented by the complainant which is not done and the complaint is filed by the complainant in his personal capacity when he in his personal capacity is not the payee or holder in due course and only his proprietary concern can be said to be the payee of the cheque.

25. Hence the complaint filed by the complainant in his personal capacity is not maintainable and it cannot be said that the ingredient section 138 and 142 are complied by the complainant.” (sic)

8. On a careful examination of the record, it is seen that in the cause title in the complaint filed by the complainant, it is nowhere mentioned that the complainant was the sole proprietor of Zenith Constructions but in para 12 of the complaint, it has been specifically stated that:

“12.

The present complaint is filed as regards to the offence under Section 138 IPC committed by Accused with respect to cheque no.574324 dated 03.10.2011 drawn on HDFC Bank, Mapusa Branch issued by the Accused to the Complainant in the name of his sole proprietary concern M/s Zenith Constructions” (sic).

9. The relevant part of the evidence in the form of affidavit filed by the complainant before the Trial Court reads as under:

"9. I say that in payment of said dues being sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs Only) with interest, as agreed to be paid jointly and severally by the accused and his wife, the accused No.1 issued the following cheques to me favoring my sole proprietary concern M/s Zenith Construction.

<i>Cheque No.</i>	<i>Date</i>	<i>Bank</i>	<i>Name of Drawee</i>
574324	3/10/2011	HDFC Bank	Zenith Constructions
For Rs.	Mapusa Branch	sole proprietary concern of	
32,00,000/-		me	
574323	3/10/2011	HDFC Bank	Zenith Constructions
For Rs.	Mapusa Branch	sole proprietary concern of	
15,00,000/-		me"	

(sic)

10. Mr. S.D. Lotlikar, the learned Senior Counsel appearing on behalf of the complainant-appellant, pointed out that in the agreement dated 04.09.2010 executed between the accused, his wife and the complainant, it was specifically mentioned that the complainant was carrying on business as a builder and developer in the name and style of his sole proprietary concern M/s Zenith Constructions. Similarly, in

the statutory notice issued by the complainant to the accused, it was specifically mentioned that the complainant was the sole proprietor of M/s Zenith Constructions. It is also pointed out that the accused did not reply to the said notice. In the cross examination of the complainant, it was nowhere even suggested that he was not the sole proprietor of Zenith Constructions.

11. In the case of *Milind Shripad Chandurkar* (supra), the appellant-complainant could not produce any document to show that he was the proprietor of Vijaya Automobiles inspite of the fact that issue had been agitated by the accused-respondent at every stage. But, here in the instant case, during the trial, the fact of the complainant being the sole proprietor of M/s Zenith Constructions was nowhere questioned, challenged or denied and therefore, the aforesaid case is clearly distinguishable on facts from the instant case.

12. The title “M/s” used in the complaint, affidavit-in-evidence, agreement dated 04.09.2010 and in the statutory notice, before the words “Zenith Constructions”, may also lead to an inference, that it was actually a partnership firm. In such circumstances, if it was not actually a partnership, but an individual proprietary concern, the burden to

prove the same lay squarely on the complainant. On the other hand, the claim of the complainant that he was the sole proprietor of Zenith Constructions was also not denied by the accused. In view of this, it would only be appropriate to remit the matter to the Trial Court to clearly reach a definite finding whether the complainant is the sole proprietor of Zenith Constructions or not. In the light of the above analysis and discussion, the impugned Judgment and Order is set aside and the matter is remitted to the Trial Court with the following directions:

An opportunity shall be given to the complainant to establish the fact that he is the sole proprietor of Zenith Constructions which is shown as “payee” in the cheque in question. The accused would also be questioned under Section 313 of the Cr.P.C. in the light of the evidence that may be adduced by the complainant in this regard and if so desired, to adduce evidence in rebuttal. After obtaining such further evidence, as may be adduced by the party/parties, the case shall be decided afresh in accordance with law, within three months from the date of appearance of the parties.

13. The parties shall appear before the learned Trial Court on 20.06.2022.

14. During the pendency of this appeal, the accused–respondent no.1 had moved an application for production of documents. However, as the matter is being remitted back to the Trial Court, the accused–respondent no.1 may move such application before the Trial Court. If such application is indeed made by the accused–respondent no.1, the Trial Court shall decide the same on its own merits. In view of this, the Criminal Miscellaneous Application No.640/2021 (F) stands disposed of.

R.N. LADDHA, J.

JOSE FRANCISCO
DSOUZA

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