IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.466 OF 2022

Mr. Hemant Prabhakar Patil, Proprietor of Kaushalya Motors, Aged about 45 years, Occupation – Business, resident of Post – Ralegaon, Tahsil _ Ralegaon, District – Yavatmal, (Maharashtra State) **.... Appellant**
(Org. Complainant)

// VERSUS //

Mr. Nitesh s/o Keshavrao Onkar, Aged about 38 years, Occupation-Nil, resident of Mata Nagar, Ralegaon, Tahsil – Ralegaon, District – Yavatmal, (Maharashtra State). **... Respondent**
(Org. Accused)

Ms A.H. Dangre, Advocate for appellant
Shri Anup S. Dhore, Advocate for respondent

CORAM : ANIL S. KILOR, J.

DATED : 08.12.2022.

ORAL JUDGMENT :

1. Heard.

2. **ADMIT.**

3. In this appeal a challenge is raised to the judgment and order dated 22.03.2022 passed in Summary Criminal Complaint No.306 of 2017 passed by the Judicial Magistrate First Class (JMFC), Ralegaon, District Yavatmal, acquitting the respondent/accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the NI Act")

4. The complainant's case in short is that, he is a proprietor of a proprietary firm 'Kausalya Motors' and does the business of selling Hero motorcycles. The complainant and the respondent were friends. In the month of October-2016, the respondent was in need of money of Rs.50,000/- which the complainant paid to him as a hand loan vide cheque (bearing No.17860) dated 14.10.2016 of his account maintained at Pusad Urban Co-operative Bank, Ralegaon.

5. It is further case of the complainant that the accused assured him to pay back the said amount on or before 30.12.2016, but failed to return the said amount. It is stated that on 27.02.2017, the respondent issued a cheque (bearing No.004813) of amount of Rs.50,000/- of his account maintained at Yavatmal Urban Co-operative Bank Ltd. in favour of the

complainant in the name of Kausalya Motors. On presenting the said cheque, it was returned for the reason of 'funds insufficient'.

6. Therefore, a statutory notice was issued on 17.03.2017, calling upon the accused/respondent to pay back the amount of Rs.50,000/- within 15 days from the date of the receipt of the notice. The notice was served upon the respondent on 22.03.2017, however, he neither paid the amount within 15 days nor gave any reply to it. Therefore, the complaint was filed.

7. The learned trial Court after recording the substance of accusation vide Exh.17, it was read over to the respondent and explained him in vernacular. The respondent/accused pleaded not guilty and claimed to be tried.

8. The complainant examined himself on affidavit vide Exh.21 to bring home guilt of the accused. The learned JMFC recorded the statement of the accused under Section 313 of the Cr.P.C. (Exh. 52).

9. The learned trial Court, after considering the oral as well as documentary evidence, passed the impugned judgment and order dated 22.03.2022, acquitting the respondent for the offence punishable under Section 138 of the NI Act. Hence, this appeal.

10. I have heard the learned counsel for the respective parties.

11. Ms Dangre, learned counsel for the appellant, submits that the learned trial Court has committed error in acquitting the respondent without considering the legal position that a proprietary concern is not a legal entity distinct from its proprietor. To substantiate her submission, she has placed reliance upon the judgment of the Hon'ble Supreme Court of India, in the case of *Shankar Finance and Investments Vs. State of Andhra Pradesh and others*[1] and the order of the Co-ordinate Bench of this Court, passed in the Criminal Revision Application (Revn) No.238 of 2019 (*Sanjay s/o Vijay Raut Vs. Ashlesha Power Control Limited, through its Managing Director, Bipin Harnarayan Dhoot, Akola, and another*) and other connected matters, dated 16.06.2022.

12. It is submitted that the learned trial Court has recorded erroneous findings by observing that the complainant has provided no evidence to show that he is a proprietor of the Kausalya Motors and further that, the Kausalya Motors authorised the complainant to file the complaint.

13. On the other hand, the learned counsel for the respondent, submits that the hand loan was given by the complainant in his personal capacity

1 (2008) 8 Supreme Court Cases 536

and not as a proprietor of the proprietary concern ‘Kausalya Motors’ and therefore, the complainant cannot be termed as “Holder” as defined under Section 8 of the NI Act. Thus, the complaint itself is not maintainable and the learned JMFC has rightly acquitted the respondent. He accordingly, prays for dismissal of the present appeal.

14. In the backdrop of the submissions advanced by both the parties, I have perused the record and the impugned judgment and order.

15. Before taking the case for consideration on merit, I am of the opinion that at this juncture, it would be relevant to refer to the findings recorded by the learned JMFC, which read thus:

> *“11. It is not disputed that accused was the friend of complainant. Complainant Hemant (CW-1) testified that, he runs the business of selling hero motorcycles under title “Kaushalya motors”. He has paid the amount of Rs.50,000/- to the accused as hand loan by cheque bearing no.17860. As such the said transaction is personal in nature. However Hemant (CW-1) in his examination-in-cross stated that, he has taken the entry of transaction of hand-loan of Rs.50,000/- with accused in the balance sheet of “kausalya motors”. It is inconceivable that, as per the case of complainant the transaction between him and accused is of hand-loan which is in their personal capacity still complainant has taken the entry of said transaction in yearly balance-sheet of his business “Kausalya motors”. It is not the case of*

complainant that, he has paid hand-loan of amount of Rs.50,000/- to the accused through the cheque of firm "Kaushalya Motors" from the income of said firm.

12. It is pertinent to mention that, the alleged cheque vide Exh.22 shows that it is issued in favour of "Kausalya Motors, Ralegaon". However the firm "Kausalya Motors" is not the complainant in instant complaint. Complainant has neither filed on record the copy of his account statement which will demonstrate the entry of debit of amount of Rs.50,000/- by cheque bearing no.17860 nor filed the balance-sheet of "kausaluya Motors". The account statement filed by complainant at Exh.49 is of the 'Kausalya Motors' which shows the entry of debit of amount of Rs.50,000/- by cheque vide Exh.22. However it does not demonstrate the name of proprietor of 'Kausalya Motors'. In examination-in-cross complainant stated that, in the year 2016-2017 he has registered his business under title "Kausalya motors". However complainant has filed no evidence on record to show that he is the proprietor of said "Kausalya motors".

13. Instant complaint is filed by complainant Mr. Hemant in his personal capacity and the transaction shown by him is also of hand-loan on the basis of friendly relationship. The notice vide Exh.25 shows that, the complainant Hemant issued the said demand notice to accused in his personal capacity. The firm "Kausalya Motors' has not issued any notice to the accused in respect of dishonor of cheque vide Exh.22. Complainant doesn't establish any nexus of his personal transaction of hand loan and the cheque vide Exh.22. The return memo vide Exh.23 is also issued by bank to the firm "Kausalya Motors" and not to the complainant. It is not the case that the

"Kausalya Motors" has authorized the complainant to file the instant complaint against accused.

14. Important ingredient for the offence punishable under Section 138 is that cheque must have been issued for the discharge in whole or in part of any debt or other liability. If the cheque is not issued for the discharge of any debt or other liability, Section 138 can not be invoked. It is not the case of complainant that, there was any business transaction between accused and "Kausalya motors". There is no evidence on record to show that the firm "Kausalya Motors" is owned by the complainant Mr. Hemant. The cheque vide Exh.22 is not issued in favour of complainant for the discharge of debt or liability. As such there is no nexus between the documentary evidence on record and the case of complainant."

16. After going through the above referred observations made by the learned Magistrate, the only question arises, the complainant has established the fact that 'Kausalya Motors' is a proprietary firm and the complainant is a proprietor of it?

17. In this regard, the oral testimony of the complainant is relevant, wherein in the first paragraph itself he has deposed that he runs his business by name "Kausalya Motors".

18. It is pertinent to note that in the cross-examination, not a single suggestion was given to the complainant that he is not a proprietor of the Kausalya Motors or the Kausalya Motors is not a proprietary firm.

19. Furthermore, the statement of account (Exh.49) of Kausalya Motors shows an entry about the amount of Rs.50,000/- as an amount paid to the respondent.

20. It is further pertinent to note that, in statutory notice (Exh.25) issued by the complainant, he categorically mentioned that he is a proprietor of the Kausalya Motors. Admittedly, no reply was given to the said statutory notice, denying the said fact.

21. If the cheque (Exh.22) is perused, which was issued by the respondent, the same is also in the name of Kausalya Motors, Ralegaon. In addition to this, in the statement under Section 313 of the Cr.P.C., the respondent has admitted that the complainant runs a business of selling two wheelers in the name of 'Kausalya Motors'.

22. Thus, there is an ample material available on record, which was before the trial Court to show that the Kausalya Motors is a proprietary concern and the complainant is a proprietor of the same.

23. In the circumstances, as there is no dispute raised by the respondent about status of the Kausalya Motors as proprietary concern or the status of the complainant as a proprietor of the said proprietary concern, but admitted the same ,the learned JMFC has unnecessarily gone into it.

24. The Hon'ble Supreme Court of India, in the case of *Shankar Finance* (supra), has held thus:

> *"10. As contrasted from a company incorporated under the Companies Act, 1956 which is a legal entity distinct from its shareholders, a proprietary concern is not a legal entity distinct from its proprietor. A proprietary concern is nothing but an individual trading under a trade name. In civil law where an individual carries on business in a name or style other than his own name, he cannot sue in the trading name but must sue in his own name, though others can sue him in the trading name. Therefore, if the appellant in this case had to file a civil suit, the proper description of plaintiff should be "Atmakuri Sankara Rao carrying on business under the name and style of M/s Shankar Finance & Investments, a sole proprietary concern". But we are not dealing with a civil suit. We are dealing with a criminal complaint to which the special requirements of section 142 of the Act apply. Section 142 requires that the complainant should be payee. The payee is M/s Shankar Finance & Investments. Therefore in a criminal complaint relating to an offence under section 138 of the Act, it is permissible to lodge the complaint in the name of the proprietary concern itself."*

25. From the above referred observations, it is evident that a proprietary concern is not a legal entity distinct from its proprietor and a proprietary concern is nothing but an individual trading under a trade name.

26. The Co-ordinate Bench of this Court in the case of *Sanjay s/o Vijay Raut* (supra), after examining the language of Section 141 of the NI Act, has held thus:

> *"4. …*
>
> *A perusal of explanation (a) and (b) to Section 141 of the NI Act, would indicate that what is included therein is a partnership firm and not a proprietorship concern for the reason that explanation (a) when it uses the word "firm" is in reference to "other association of individuals" and therefore, would indicate a partnership firm comprising of two and more partners. This is further fortified by explanation (b) to Section 141 of the NI Act, which further indicates that the word "director" in relation to a firm would mean a partner in the firm. Thus, in my considered opinion, explanation (a) and (b) to Section 141 of the NI contemplate a partnership firm and not a proprietorship concern. The judgments relied upon by Shri Dhore, learned Counsel for the applicant, namely, Aneeta Hada, Himanshu and Ramesh (supra) all consider the situation, where the complaint was made against a company/partnership firm and not against a proprietorship concern and therefore, are of no assistance to the argument advanced by Shri Dhore, learned Counsel for the applicant. This being the position, in my considered opinion, the filing of the*

> *complaint against applicant/accused - Sanjay Vijay Raut, claiming him to be a proprietor of Global Engineering Services, cannot be said to be infirm or contrary to the mandate of Section 141 of the NI Act as Section 141 of the NI Act, on the facts of the present matter, is clearly not attracted."*

27. In the teeth of the above referred well settled principle of law, I revert back to the fact of the present case. Admittedly, in the case at hand, the respondent issued a cheque in the name of "Kausalya Motors, Ralegaon" and the respondent admits in his statement under Section 313 of the Cr.P.C. that the complainant is the proprietor of the Kausalya Motors. Further, the respondent neither by giving reply to the statutory notice, issued by the complainant, nor in cross-examination, denied the status of the complainant as proprietor of the Kausalya Motors. In the circumstances, findings recorded by the learned JMFC in paragraph Nos.11 to 14 as regards the ownership of the Kausalya Motors, are erroneous and perverse.

28. As the ultimate conclusion to acquit the respondent is based on such erroneous and perverse findings recorded by the learned JMFC, the impugned judgment and order needs to be quashed and set aside and the

matter needs to be remanded back for deciding afresh. Accordingly, I pass the following order:

i) The criminal appeal is **allowed**.

ii) The judgment and order dated 22.03.2022, is hereby quashed and set aside.

iii) The matter is remanded back to the JMFC, Ralegaon for the decision afresh, after hearing both the parties.

iv) The amount deposited by the respondent in this Court shall be transferred to the trial Court.

The appeal is accordingly **disposed** of.

All pending applications, if any, shall stand disposed of.

[ANIL S. KILOR, J.]