IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.202 OF 2010

Fullerton India Credit Company Ltd.
a Non-Banking Finance Co. interalia
having its Branch Office at 2nd Floor,
Raka Mall, Jaistambh, Amravati
through its Authorized Representative
Mr. Ajay Ramrao Kolsekar

...APPELLANT

VERSUS

Shekh Shakir Mohammad Rafique,
Aged – Major, R/o Chandni Chowk,
Hatipura, Near Masjid,
Amravati

...RESPONDENT

Shri A.A. Naik, Advocate for the appellant.
Shri Y.N. Sambre, Advocate for the respondent.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : AUGUST 04, 2023.

ORAL JUDGMENT :

Heard finally with the consent of learned Counsel for the parties.

2. By preferring this appeal the appellant has challenged the judgement and order of aquittal passed by the Judicial Magistrate First Class, Amravati in Criminal Case No.216 of 2009 by which the accused was acquitted on 25th September, 2009.

3. The brief facts which are necessary for the disposal of the appeal are as under :

A] The complainant Fullerton India Credit Company Ltd. is engaged in the business of providing private credit facility and other allied activities through its branches all over India. The accused was in need of financial assistance, therefore, he approached to the complainant and assured that he will repay the loan amount along with the interest by instalments. Accordingly, he executed the agreement with the complainant and complainant sanctioned loan of Rs.51,749/- to the accused. In discharge of the legal debt accused issued cheques bearing numbers 310451, 310452 and 310453 dated 04/07/2008, 04/08/2008 and 04/09/2008 respectively each for the amount of Rs.2861/- drawn on HDFC Bank, Amravati in favour of the complainant.

B]. On presenting the cheques, the cheques return back with an endorsement "account closed". Accordingly, the complainant issued the demand notice calling upon the accused to pay the money. Said notice was received by the accused on 26/11/2008. In view of the mandate of Section 138 of the Negotiable Instrument Act, 1881 the accused has not repaid the amount, and therefore, the complaint is filed by the complainant.

4. After recording of the verification, the learned trial Court has issued the process. The accused appeared before the Court and pleaded not guilty and claimed to be tried. He has denied the contentions of the complainant. He also denied that he executed any agreement and obtained any loan and issued any disputed cheques. Thus, he has denied that there was any legal debt and he has issued the cheque in discharge of the said legal debt. Learned trial Court has appreciated the evidence adduced by the complainant as well as the submission of learned Counsel for the applicant as well as for the accused and held that in case of company if Power of Attorney holder is having personal knowledge of alleged transaction, then he can be examined on behalf of the complainant because company can be represented only through living persons. The company is *de jure* complainant and Attorney holder becomes *de facto* complainant. The evidence of witness of the complainant does not state that either he has personal knowledge of the alleged loan transaction or he was present at the time of the said transaction. He has not stated since when he is working in the company and what was his nature of the work. Thus, the entire transaction was not took place in his presence and hence he has no personal knowledge and acquitted the accused.

5. Being aggrieved and the dissatisfied with the judgement and order of the acquittal, present appeal is preferred by the complainant on

the ground that the learned trial Court has not considered that the present witness Ajay Kolsekar was the employee of the complainant. The Power of Attorney was issued in his favour. He has deposed on the basis of the documents. The documents on record sufficiently shows that there was a loan transaction between the complainant and the accused and accused has issued the cheque in discharge of the legal debt. There is a presumption in favour of the complainant. In view of that the learned trial Court's order is erroneous, illegal and liable to be set aside.

6. Heard learned Counsel Shri Sambre for the complainant. He reiterated the contention and submitted that it is settled law that the company can be represented through the Power of Attorney. In view of that, witness Ajay Kolsekar is the Power of Attorney Holder for the complainant. Entire case is based on the documentary evidence. The documents on record show that the accused has obtained the loan from the complainant and issued the cheque in discharge of the legal debt. The complainant has proved the transaction on the basis of the agreement which was filed on record and it is substantiated by the oral evidence of the witness of the complainant. In view of that, the judgement and order of the acquittal is erroneous and liable to be set aside.

7. Though notices are served on the respondent-accused, none appeared for the respondent, and therefore, appeal proceeded in his absence.

8. The issue involved in the present appeal that whether the Power of Attorney who was not present at the time of transaction can deposed on behalf of the Company and whether said evidence is sufficient to prove the transaction. Order III Rule 1 and 2 of the Code of Civil Procedure empowers the holder of power of attorney to "act" on behalf of the principal. The word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "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 to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the 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 is entitled to be cross-examined.

9. Admittedly, the company is *de jure* complainant and it is to be represented by some person. To prove the transaction, the entire evidence adduced by the complainant is by examining PW-1 Ajay

Kolsekar whose evidence shows that he is a duly authorised by the complainant to file the complaint and produce the Power of Attorney which is at Exhibit 19. In view of that power of attorney, general powers was given to him to file complaint and appear in the Court and give any other submission in writing and appear as a witness in the Court. Thus, no special power of attorney was executed in favour of PW-1. PW-1 Ajay Kolsekar is authorised to present file and conduct case on behalf of the complainant. His evidence nowhere shows that he was personally present at the time of alleged transaction or he is acquainted with the facts of the present case and on the basis of information or on the basis of referring the documents, he is deposing before the Court. Thus, his evidence is silent regarding his personal knowledge regarding the said transaction.

10. The Hon'ble Apex Court in the case of ***A.C. Narayanan Vs. State of Maharashtra and anr. [(2014) 11 SCC 790]*** and ***G. Kamalakar Vs. Surana Securities Ltd. and anr. [(2014) 11 SCC 790]*** has dealt with the issue and held that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of

the business of the complainant-payee and the attorney holder alone is personally aware of the transactions, there is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. On this count, the Hon'ble Apex Court has also considered the conflicting judgements in ***M/s. M.M.T.C. Ltd. and anr. Vs. Medchl Chemicals and Pharma (P) Ltd. and anr. [(2002) 1 SCC 234] and Janki Vashdeo Bhojwani and anr. Vs. Indusind Bank Ltd. and ors., [(2005) 2 SCC 217]*** and clarified the position and answer the questions in the following manner :

> (i) Filing of complaint petition under Section 138 of N.I. Act through power of attorney is perfectly legal and competent.
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> (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.
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> (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.

11. In the light of the above observations and the guidelines issued by the Hon'ble Apex Court, in the present case the complaint filed by the complainant is also silent regarding the personal knowledge of the present witness PW-1 Ajay Kolsekar regarding the alleged transaction. His evidence is also silent regarding his personal knowledge of the said transaction.

12. In view of that learned trial Court has rightly considered the judgement in *M/s. M.M.T.C. Ltd.* (*supra*) and observed that in case of

company if Power of Attorney holder is having personal knowledge of alleged transaction then he can be examined on behalf of the complainant because Company can be represented only through living persons. He further observed that the evidence of PW-1 does not state that he has personal knowledge of alleged loan transaction and observed that complainant failed to prove that accused has issued a cheque in its favour against the legal and enforceable debt.

13. After going through the settled principle of law and after going through the evidence of the witnesses adduced by the complainant, I do not find any error committed by the learned Judicial Magistrate First Class, therefore no interference is called for in the said judgement and order. Thus, appeal is devoid of merits and liable to be dismissed.

14. Hence, the appeal is dismissed.

(URMILA JOSHI-PHALKE, J.)

**Divya*