IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 946 OF 2006

Neel Dharia
Age : 42,
Through his Power of Attorney Holder:
Shri. Kiran Kantilal Dharia
R/o. 4-B/2, Great Eastern, 333,
Belsish Road, Tardeo, Mumbai - 34. ...Appellant

Versus

1. The State of Maharashtra

2. R.C. Gandhi and Company 29,
Nakhoda Street, 3rd Floor,
Kolsa Mohalla, Mumbai-3.
New Address :
C/o Naresh Ratilal Gandhi,
OM Sai, A-502, Ratna Rajula,
M.G. Road, Kandivali,
Mumbai - 67.

3. Rajanibhai R. Gandhi
Partner of R.C. Gandhi and Company,
R/a. B-23, Shiv Darshan, 2nd Floor,
Sardhar Vallabhai Patel Road,
Opp. Garden Near Shankar Galli,
New Address :
B-Wing, Shrinath Tower,
1103, Shankar Galli, Kandivali (W).
Mumbai - 67.

4. Naresh Ratilal Gandhi
Partner of R.C. Gandhi and Company,
Pancham Building No.1, CHS. 402
B-wing, 4th Floor Hemokali Road No.2.
and 3, Iraniwadi, Kandivali, Mumbai-67.
New Address :
OM Sai, A-502, Ratna Rajula,
M.G. Road, Kandivali,
Mumbai - 67.

5. Jitendra Ratilal Gandhi
Partner of R.C. Gandhi and Company,
201, Adarsh Galaxi, 2nd Floor,
Adarsha Dugdhalaya Lane, Shankar Galli,
Kandivali (W), Mumbai - 67. ...Respondents

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Ms. Ilsa Shaikh for Appellant.

Mr. Yashpal Thakur a/w Mr. Sandeep Gupta i/by Ms. Neeta Parikh Advocate for Respondent Nos. 2 to 5.

Mr. Y. Y. Dabake, APP for Respondent No.1-State.

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CORAM : PRAKASH D. NAIK, J.

JUDGMENT DATE : 15th JANUARY 2024

JUDGMENT:

1. This appeal is preferred under Section 378(4) of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") challenging the Judgment and order dated 15.07.2006 passed by the Learned Metropolitan Magistrate, Mumbai in Criminal Case No.4353/SS/2005.

2. The appellant is the original complainant. The Respondent Nos.2 to 5 were accused. The complaint was filed for an offence under Section 138 of the Negotiable Instruments Act. (for short "NI Act").

3. The brief facts emanating from the complaint are as under:

i) M/s. R.C. Gandhi and Company is a partnership firm carrying on business through its partners. Accused Nos.2, 3 & 4 were in-charge and responsible for the conduct of business of accused No.1.

ii) Towards discharge of their liability, the accused issued cheque dated 03.02.2003 bearing no.727137 for an amount of Rs.9,00,000/-. The cheque was drawn on Mogaveera Co-operative Bank Ltd., Mumbai.

iii) The complainant presented the cheque through his partners on 04.02.2003. It was returned dishonoured with remarks "Exceeds arrangement".

iv) The complainant called upon the accused to pay the amount vide Advocate's letter dated 14.02.2003 posted on 18.02.2003. The notices were sent by the complainant's Advocate through registered A.D. The accused did not accept the notices deliberately and the same were returned with postal remarks “Left”/ “Unclaimed” / “Not Claimed”.

v) The notices were deemed to have been received by the accused on or about 20.02.2003. The complainant demanded the payment from the accused within stipulated time. The accused failed to make the payment to the complainant.

vi) The complaint was filed on 03.04.20036. Verification statement of the complainant was recorded through Power of Attorney holder on 27.06.2003. Process was issued against the accused for an offence under Section 138 of the NI Act vide order dated 27.06.2003.

4. The Appellant filed Affidavit of Evidence on 04.08.2005. The complainant was cross examined on 08.08.2005. PW-2 Dheeraj B. Putan was examined by the complainant on 26.09.2005 and cross examined by the Advocate for accused on the same day. PW-1 was allowed to be further cross examined by the Court and the cross examination was conducted on 28.09.2005. The Advocate for complainant sought time for filing application to re-examine the witness and the case was adjourned. Complainant through Power of Attorney was re-examined on 25.11.2005. He was cross examined on 07.03.2006. Statement of accused was recorded under Section 313 of Cr.P.C. Accused No.4 examined himself as defence witness on 21.03.2006. He was cross examined.

5. Vide Judgment and order dated 15.07.2006, the accused were acquitted.

6. The acquittal of the accused was based on the following grounds.

i) The complainant paid the loan of Rs.9,00,000/- to accused Company on 21.12.1998. The accused issued cheque in favour of the complainant towards the repayment of the loan amount on 19.08.2000 for Rs.9,00,000/-. Cheque was dishonoured on 22.08.2000. The accused again issued cheque bearing No.727137 dated 03.02.2003 for an amount of Rs.9,00,000/-. The said cheque was dishonoured on 05.02.2003. As per Section 18 of the Indian Limitation Act, before expiration of the limitation there should be an acknowledgment of liability in writing by the borrower. As per Section 19 of the Indian Limitation Act, there should be payment on account of debt or interest on a liability is made before expiration of prescribed period by the person liable to pay the debt or liability or by his agent duly authorized in this behalf and such payment has to be acknowledged in writing. As per Section 25(3) of the Contract Act, there must be promise made in writing signed by the borrower or by his agent generally and specifically authorized in that behalf to pay whole or in part a debt of which the creditor might have enforced the payment. The cheque was issued beyond the limitation of three years. Hence, it was a time barred debt. The liability is not enforceable in law.

ii) The complaint was filed thorough Power of Attorney. The Power of Attorney holder had no personal knowledge of the transaction. He cannot depose on behalf of the complainant.

7. Learned Advocate for the appellant submitted that the trial Court has committed an error in acquitting the accused. The findings of the trial Court that the debt was time barred and hence liability was not legally enforceable is erroneous. The trial Court has erroneously relied upon the provisions of the Indian Limitation Act by observing that the transaction was of 1998 and that the cheque was issued in 2003. For initiating action under Section 138 of the NI Act, the issuance of cheque and its dishonour give rise to cause of action for initiating the proceedings under Section 138 of the NI Act. Issuance of cheque is revival of the cause of action and acknowledgment of debt. In the present case the accused had initially issued a cheque in discharge of liability on 21.12.1998. Promissory note was executed between the parties wherein accused No.3 is the signatory of the promissory note on 30.12.1998. Cheque was issued by Accused No.1 and signed by accused No.2 as a partner on 19.08.2000. Cheque was dishonoured on 22.08.2000. Another cheque was issued by accused No.1. It was signed by accused No.3 as a partner. The second cheque was issued for repayment of the loan. The said cheque was dishonoured on 05.02.2003. Legal notice was given to the accused on 14.02.2003.

It was returned with remarks "unclaimed" on 24.02.2003. The complaint was filed on 03.04.2003. Thus the debt is not time barred.

8. Reliance is placed on the decision of this Court in the case of **Dinesh B. Chokshi Vs. Rahul Vasudeo Bhatt and Another**[1].

9. It is further submitted that the complaint was filed through Power of Attorney. In the Affidavit in Evidence of the complainant it was stated that the Power of Attorney holder is acquainted with facts leading to filing of the complaint under Section 138 of the NI Act on behalf of his son. He has transacted the subject transaction. He is fully aware about the facts leading to filing of the complaint. The said averment shows that the Power of Attorney holder could depose on behalf of the complainant on the basis of Power of Attorney. Thus, the evidence of the Power of Attorney holder, who deposed on behalf of the complainant cannot be discarded. The complainant has brought on record the Power of Attorney as well as the second Power of Attorney ratifying the previous Power of Attorney.

10. Reliance is placed on the following decisions:

i) **Shankar Finance and Investments Vs. State of Andhra Pradesh and Ors**[2].

1 2013 (2) Mh.L.J. 130
2 (2008) 8 SCC 536

ii) Jugraj Singh and Another Vs. Jaswant Singh and Others[3].

iii) La Chemise Lacoste and Anr. Vs. Crocodile Indl. Pte. Ltd[4].

11. Learned Advocate for the Respondent Nos.2 to 5 submitted that in the light of decisions in force at relevant time, the trial Court had acquitted the accused on the issue of time barred debt. The decision in the case of **Dinesh B. Chokshi** (supra) was delivered subsequently. The transaction is of 1998. The first cheque was issued on 19.08.2000. It was dishonoured on 22.08.2000. The second cheque which is the subject mater of the complaint was dated 03.02.2003. The said cheque was dishonoured on 05.02.2003. In the light of the provisions of the Indian Limitation Act, filing of suit was time barred as the period of three years had lapsed. Merely on the ground that the second cheque was dishonoured subsequently the limitation to initiate proceeding does not extend. The debt or liability is of 1998 hence, the trial Court has rightly acquitted the accused on the issue of time barred debt. It is further submitted that the Power of Attorney holder had no authority to depose on behalf of the complainant. The complainant for the first time had deposed by way of Affidavit of Evidence, that he had transacted subject transaction on behalf of his son. He is

3 1970(2) SCC 386
4 2007 SCC OnLine Del 2039

therefore fully aware about the facts leading to filing of the complaint. There is no evidence to substantiate the fact that the Power of Attorney holder has transacted the transaction. The Power of Attorney holder has stated that he was operating the bank account. The evidence on record discloses that the Power of Attorney holder was unaware of the transaction or the facts of the case. There was no such assertion in the complaint. The cross examination of this witness would demonstrate that the Power of Attorney holder lacks knowledge of the transaction or facts of the case. The complainant has relied upon the second Power of Attorney which purportedly ratifies the first Power of Attorney. The said Power of Attorney was allegedly executed in foreign country. It is further submitted that the memo containing endorsement of the bank was not adduced in evidence. What was produced is the stamp relating to clearing of the cheque.

12. Reliance is placed on following decisions:

i) **A.C. Narayanan and Ors Vs. The State of Maharashtra and Ors[5].**

ii) **Jaimin Jewellery Exports Pvt. Ltd. and Ors. Vs. The State of Maharashtra and Ors[6].**

iii) **Vandana Vs. Abhilasha[7].**

5 AIR 2014 SC 630
6 2017 (1) BomCR (Cri) 643
7 2018(4) BomCR (Cri) 774

iv) Chandrappa and Ors. Vs. State of Karnataka[8]**.**

v) The State of Maharashtra Vs. Kalpak Bhaskar Gadhave[9]**.**

13. As far as the first issue is concerned, the law is well settled. The division Bench of this Court in a reference made by the Single Judge In the case of **Dinesh B. Chokshi** (supra) has set at rest the controversy. It was observed that on plain reading of Section 13 of the NI Act, it is clear that a negotiable instrument does not contain a promise to pay the amount mentioned therein. The promise is given by the drawer. Under Section 6 of the NI Act, a cheque is a bill of exchange drawn on a specified banker. The drawer of a cheque promises to the person in whose name the cheque is drawn or to whom the cheque is endorsed, that the cheque on its presentation would yield the amount satisfied therein. Hence, the cheque is a promise within the meaning of Sub-section 3 of Section 25 of the Contract Act. When a cheque is drawn to pay wholly or in part, a debt which is not enforceable only by reason of bar of limitation, the cheque amounts to promise governed by Sub-Section 3 of Section 25 of the Contract Act. Such promise which is an agreement becomes exception to the general rule that an agreement without consideration is void. Though on the date of making such promise by issuing a cheque, the debt which is

8 2007 CriLJ 2136.
9 II(2022) BC 439 (Bom

promised to be paid may be already time barred, in view of Sub-section 3 of Section 25 of the Contract Act, the promise/agreement is valid and therefore the same is enforceable. The promise to pay time barred debt becomes a valid contract. Promise created by a cheque issued for discharge of a time barred debt or liability and the promise in the form of a cheque drawn in discharge of a time barred debt or liability becomes enforceable by virtue of Sub-section 3 of Section 25 of the Contract Act. Such cheque becomes a cheque drawn in discharge of legally enforceable debt as contemplated by the explanation to Section 138 of the Act. Thus, it cannot be said that the cheque was not issued in discharge of legally enforceable liability on the ground that the debt was time barred.

14. The second issue involved in this matter is about the evidence of Power of Attorney holder, who had deposed on behalf of the person in whose favour the cheque was issued.

15. It is well settled law that a Power of Attorney holder can file a complaint. The Power of Attorney holder can depose before the Court if he has personal knowledge of the transaction. In the present case the cheque was issued in favour of Neel Dharia. The complaint was filed through the Power of Attorney holder Kiran Kantilal Dharia. The complaint mentions that Shri. Kiran Kantilal

Dharia is the Power of Attorney holder of Neel Dharia (Complainant). Complaint does not provide for any details of Power of Attorney. The complaint is silent about the fact that the Power of Attorney holder has personal knowledge of the transaction in question. The Affidavit of Evidence was filed stating that the deponent is authorized by his son to file Criminal Complaint against the accused by Power of Attorney dated 09.05.2005. The Power of Attorney holder on behalf of his son have transacted the subject transaction. The Power of Attorney holder is acquainted with the facts and fully aware about the facts leading to filing of complaint. The first two paragraphs of the Affidavit of Evidence indicate that the Power of Attorney speaking for himself and Paragraph-3 onwards are depositing on behalf of complainant. Except the version reflected in Paragraph-2 of the Affidavit of Evidence there is nothing in the Affidavit to fortify the fact that the Power of Attorney holder has knowledge of the facts of the transaction. In the cross examination, PW-1 has stated that he was given original Power of Attorney in February-2003. It was executed in USA. It was sent to him. Power of Attorney was not signed in his presence. When it was executed PW-1 was not in USA. At the time of filing complaint he had the Power of Attorney. He filed the copy of Power of Attorney along with complaint. The complaint was filed on 03.04.2003. He do not recollect whether he filed Power of Attorney or its copy with complaint. He can say that he has not filed the copy of Power of Attorney alongwith the complaint. He signed the Power of Attorney when he received it from USA. The complainant was having bank account in Central Bank of India. It was operated by him. He knows Shantibhai Mehta. He used to borrow money from others for his business. Complainant had given loan to R.C. Gandhi. He was not knowing the accused company. Loan was given to accused through Shantibhai Mehta. He was informed by Shantibhai Mehta that accused Nos.2 to 4 are partners of accused No.1. He have not personally verified the said fact. His deposition make it evident that he had no personal knowledge of the transaction. He further deposed that he have brought the original Power of Attorney. The stamp paper was purchased in name of complainant in India. On date of purchase on 29.01.2003, Neel Dharia was not in India. Power of Attorney was prepared on 09.05.2000. On questioning as to why Neel Dharia did not execute Power of Attorney on 09.05.2000 while he was in India, he stated that he had executed Power of Attorney in February-2003. In the last page of Power of Attorney it is written this day of May-2000. The original Power of Attorney was prepared in India on 09.05.2000. Except docket there is no date, month and year mentioned anywhere on any page of Power of Attorney. The word complainant in complaint and affidavit refers to Neel Dharia. He has not produced any documents to show that Neel Dharia paid loan to R.C. Gandhi & Co. On 28.09.2005, the Advocate for complainant sought time to file application for re-examination of complainant. It is pertinent to note that, complaint was filed on 03.04.2000. Complaint does not refer to date of Power of Attorney. The verification statement of complainant do not refer to date of Power of Attorney. It was recorded on 27.06.2003. The Affidavit of evidence of complainant refers to Power of Attorney dated 09.05.2005. The Affidavit was filed on 04.08.2005. The date of Power of Attorney referred to in Affidavit in evidence is contradictory to his deposition before the Court in cross examination. In the re-examination it is stated that on the basis of Power of Attorney dated 915 of 2000 and February-2003, he filed complaint. Power of Attorney dated 09.05.2000 was prepared by Advocates and solicitors. It was signed by Neel Dharia before Advocate and original is submitted before Financial Institution. He has photocopy attested by Advocate. He produces Power of Attorney dated 09.05.2000. The Power of Attorney dated 09.05.2000 reflects power assigned to Kiran Dharia. In cross examination conducted on 07.03.2006 it was stated that he has not produced original Power of Attorney dated 09.05.2000. On 30.08.2005 Neel Dharia was not in India. Neel Dharia has not purchased stamp papers from India. The complainant relied on Power of Attorney dated 02.09.2005 ratifying Power of Attorney dated 09.05.2000 and February 2003. In cross examination PW-1 admitted that Power of Attorney dated 02.09.2005 is not executed in his presence. It is also not executed in presence of Indian High Commissioner based in USA. The said Power of Attorney does not bear his signature. The Power of Attorney relied upon by PW-1 speaks volumes of doubt about his authority and does not reflect personal knowledge of PW-1 to depose before Court.

16. PW-2 Dheeraj Putan is the Officer of Bank. He produced statement of account. He stated that cheque was drawn in account of R.C. Gandhi and Company.

17. In the case of **A.C. Narayanan and Ors Vs. The State of Maharashtra and Ors.** (supra) it was held that the verification affidavit of the constituted attorney is not on the basis of the personal knowledge and it would squarely fall within the ambit of hearsay evidence and cannot be read in evidence in a Court of law. The Power of Attorney holder may be allowed to file, appear and depose for the purpose of issue process for an offence under Section 138 of the NI Act. An exception to the above is when the

Power of Attorney holder of the complainant does not have personal knowledge about the transaction, then he cannot be examined. 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. In this case the constituted attorney did not file the Power of Attorney along with the complaint or with verifying statement. The Court was answering reference with regard to the interpretation of Section 142(a) of the N.I. Act. The reference was made in view of observations of the decisions in the case of **M.M.T.C. Ltd. and Anr. Vs. Medchl Chemicals and Pharma (P) Ltd and Anr**[10] and **Janki Vashdeo Bhojwani and Anr. Vs. Indusind Bank Ltd and Ors**[11]. After analysing the law, the Apex Court in Paragraphs 23 and 26 observed as follows:

> " 23. In the light of the discussion, we are of the view 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

10 2002(1) SCC 234
11 2005 (2) SCC 217

> 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 fourth question becomes infructuous.
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> 26. While holding that there is no serious conflict between the decisions in MMTC (supra) and Janki Vashdeo Bhojwani (supra), we clarify the position and answer the questions in the following manner:
>
> (i) Filing of complaint petition under Section 138 of NI Act through power of attorney is perfectly legal and competent.
>
> (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.
>
> (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."

18. This Court in the case of **Jaimin Jewellery Exports Pvt. Ltd. and Ors. Vs. The State of Maharashtra and Ors[12].** has reiterated the same law by referring to the decisions of the Apex Court mentioned herein above.

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12 2017 ALLMR (Cri) 2994

19. In the case of **Shankar Finance and Investments Vs. State of Andhra Pradesh and Ors.** (supra) it was held that where the payee is a proprietary concern, the complaint can be signed only by the proprietor of the proprietary is not sound. An attorney holder is the agent of the grantor and where he is authorised by the grantor to initiate legal proceedings he does so as his agent and the initiation is by grantor represented by his attorney holder and not by the attorney in his personal capacity. Where the Power of Attorney had been properly executed, complaint filed by attorney holder in writing on behalf of payee proprietary concern was maintainable. Where the Attorney holder has personal knowledge of transaction he can be examined. In the case of **Jugraj Singh and Another Vs. Jaswant Singh and Others** (supra) it it held that proper Power of Attorney duly authenticated as required by law has to be made before power can be conferred on another either to execute a document or to present it for registration. The second Power of Attorney can be effective to render valid the transaction of sale and registration of document both earlier than the Power of Attorney. The first Power of Attorney can be verified. The verification relates back to the original act. In the case of **La Chemise Lacoste and Anr. Vs. Crocodile Indl. Pte. Ltd. (supra)** it was observed that as per provisions of Diplomatic and consular officers (Oath and Fees) Act,

1948, Diplomatic and Consular Officers have been empowered to administer oath and do any notorial act. The documents notarized by such officers would be considered as validly not arose in India. The decisions relied upon by learned Advocate for applicants are of no assistance to the appellant considering the facts and issues involved in the present case.

20. In the light of the aforesaid circumstances, the evidence of the Power of Attorney holder cannot be considered and therefore no infirmity can be found in respect to the decision of the trial Court on the said issue on which the acquittal is based. The Respondents are entitled for acquittal on this issue. The issue about not adducing memo containing endorsement of the bank is urged for the first time and not the ground on which accused were acquitted. Learned Advocate for Appellant submitted that the endorsement is on record. It is not possible to accept the contentions of accused. However, considering the issue of Power of Attorney, no case is made out to interfere in the impugned Judgment of acquittal.

ORDER

Criminal Appeal No.946 of 2006 is dismissed.

(PRAKASH D. NAIK, J.)