IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.814 OF 2014

M/s.K.K.Links through its proprietor
Mr.Deepak Chandulal Lohana,
Office at 309, Anurag Business Centre,
W.T.Patil Marg, Chembur,Mumbai-400071 Appellant
versus
1. Harish Ashok Naik,
Office at Vihang Residency, Shop No.8,
Sector 6, Near Palm Beach Road, Nerul,
Navi Mumbai.

2. The State of Maharashtra Respondents

Mr.Amar Bhatt with Ms.Namrata Kadam and Neha Upadhyay i/by Yogesh Keny for Appellant.
Mr.J.S.Kini with Mr.Aum Kini i/by Ms.Suresh Dubey for Respondent no.1.
Mr.Arfan Sait, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 3rd January 2024

JUDGMENT :

1. The Appellant is the original complainant in Criminal Case No.413/SS/2013. The complaint was filed for the offence under Section 138 of Negotiable Instruments Act (N.I.Act). It was filed against Respondent no.1.

2. Vide judgment and order dated 21st March 2014 passed by learned Metropolitan Magistrate, 60th Court, Kurla, Mumbai, the Respondent no.1 was acquitted for the offence u/s.138 of N.I.Act.

3. The case of complainant is as follows :-

(i) The complainant is proprietary concern. Deepak Chandulal Lohana is its proprietor.

(ii) The accused is investor in lands. Complainant approached the accused for purchasing a plot. Accused represented that he has invested in certain land. In 2011, the complainant paid Rs.36 lakh to the accused;

(iii) On 13th December 2012 the accused entered into a Memorandum of Understanding with complainant. However, due to rise in prices of plot, accused was not interested in completing transaction. The MOU was orally cancelled;

(iv) Accused agreed to pay Rs.70 lakh to the complainant. Accused paid Rs.10 lakhs. For the balance amount, accused issued cheque dated 15th February 2013 for Rs.60 lakh;

(v) On presentation the cheque was dishonoured on 16th February 2013 for want of sufficient funds in the account of accused;

(vi) Demand notice dated 20th February 2013 was sent by complainant and accused was called upon to pay the cheque amount. Accused received notice and replied it on 2nd February 2013. Payment was not made. Complaint was filed on 3rd April 2013.

4. Process was issued against accused vide order dated 3rd May 2013 for offence u/s.138 of N.I.Act. Plea of the accused was recorded on 12th July 2013. Affidavit in lieu of examination-in-chief of the complainant was filed on 13th August 2013.

5. As per evidence of complainant he is the proprietor of K.K.Links. The firm wanted to purchase plot of land. The proprietor approached accused. Amount of Rs.36 lakhs was paid in 2011 to the

accused. An MOU dated 13th December 2012 was executed. Due to rise in prices of land, MOU was orally cancelled and accused agreed to pay Rs.70 lakhs. Accused issued three cheques. Two cheques were of Rs.5 lakhs each and third cheques was for amount of Rs.60 lakhs. Both the cheques of Rs.5 lakhs were dishonoured. Accused made RTGS payment of Rs.10 lakhs. Thereafter complainant was instructed to deposit cheque of Rs.60 lakhs. It was deposited on 15th February 2013. It was dishonoured with remarks `insufficient funds'. Legal notice was sent. It was received by accused. Reply was sent. Complaint was filed. MOU, cheque, bank memo, notice, postal receipt, postal acknowledgement and reply were marked as Exhibits.

6. The complainant was cross-examined by advocate for accused. In the cross examination the complainant admitted that he has not filed any document to show that he is proprietor of K.K.Links. He met accused for first time in Vashi. He do not remember the day, month and year in which he met the accused for the first time. He did not inquire whether accused own any land. He had not verified the title of documents of land. He had not inquired about the title of land through advocate. The amount of Rs.36 lakhs was paid in installments. He do not remember the details of installments paid by him. The amount was paid in cash and cheque. The MOU was drafted by advocate on instructions of both parties. The MOU does not bear notary registration number.

7. Statement of the accused was recorded u/s.313 of Cr.P.C. The defense of the accused is that he did not issue cheque of Rs.60 lakhs. He owes Rs.11,50,000/-. He was ready to pay it. False case is filed. Blank signed cheque was lying with Manoj Awasthi. He do not know how the cheque came in custody of complainant.

8. The accused examined himself as defense witness no.1 and Prabhakar Mhatre as defense witness no.2.

9. DW-1 Harish Ashok Naik (accused) deposed that, he do not know that Mr.Deepak Lohana is proprietor of M/s.K.K.Links. Accused was commission agent. There was transaction of purchase of land. Mr.Deepak Lohana paid Rs.23,50,000/- as commission. Rs.12 lakhs were returned to him. Accused paid Rs.10 lakhs by RTGS to complainant. Rs.2 lakhs were paid to him by cash. The cheque in question does not bear his signature. Cheque was given to Manoj Awasthi. He owe Rs.11,50,000/- to the complainant. In cross-examination he stated that, he possess license as estate agent. The MOU bears his signature. In reply it is not mentioned that cheque was given to Manoj Awasthi. It was sent to Manoj Awasthi through his friend Prabhakar Mhatre and Kapil Singh.

10. DW-2 Prabhakar Mhatre stated that accused handed over one cheque to him for giving it to Manoj Awasthi. It was blank and unsigned. He gave cheque to Mr.Awasthi. In cross-examination it is stated that accused is his friend. He also worked as peon with him.

11. The Trial Court held that accused had issued cheque. It was issued in discharge of liability. The accused was acquitted on the ground that complaint was not filed through proper person. It was observed that M/s.K.K.Lines is proprietary concern and Deepak Lohana is its proprietor. Cheque is in name of K.K.Links. Complaint is filed in the name of K.K.Links. No documents is placed on record by the complainant to show that Deepak Lohana is proprietor of M/s.K.K.Links. The accused relied on decision in the case of Milind Shripad Chandurkar Vs. Kalim Khan (2011-Cr.L.J.[SC]1912). The

Court observed that the decision is identical to the facts of this case. In the cross-examination, Deepak Lohana has stated that he has not filed any document to show that he is proprietor of M/s.K.K.Lines. Till date, no document is placed on record to show that Deepak Lohana is proprietor of M/s.K.K.Lines. Complaint is filed by proper person. So it is not maintainable.

12. Learned advocate for Appellant-complainant submitted that judgment of the Trial Court is erroneous. The complainant had complied with all procedural safeguards. The complaint was filed within limitation. The complainant has established the liability in respect to the cheque. Although the Trial Court has given all the findings in favour of complainant, the accused was acquitted on the ground that complaint is not filed by proper person. The judgment of Trial Court clearly mentions that all the ingredients to constitute offence u/s.138 of N.I.Act was established except the document relating to proprietorship of Deepak Chandulal Lohana. The document with regards to the proprietorship of Deepak Chandulal Lohana is available. This Court can look into the same or remand the matter back to the Trial Court for trial to enable the complainant to adduce additional evidence. The complainant has established that cheque was issued in respect to legally enforceable liability. The Trial Court ought not to have acquitted the accused on technical ground. In the complaint it is mentioned that complaint is filed by M/s.K.K.Links through its proprietor Mr.Deepak Chandulal Lohana. Affidavit of evidence was filed by Deepak Lohana. If the document relating to proprietorship of Mr.Deepak Chandulal Lohana is not taken on record by this Court, the Trial Court may be directed to consider said document by remanding case back to Trial Court. He relied upon decision of Apex Court in the case of <u>Bhupesh Rathod Vs.</u>

Dayashankar Prasad Chaurasia and another (Criminal Appeal No.1105/2021, decided on 10th November 2021).

13. Learned advocate for Respondent no.1 submitted that in spite of opportunity being available to the complainant to produce the document showing that Mr.Deepak Chandulal Lohana was the proprietor of M/s.K.K.Links, he did not produce the document. Since complainant did not took any steps to adduce said document in evidence, at this belated stage the Trial Court cannot be directed to take cognizance of said document. Assuming that this Court has power to take into consideration additional evidence in exercise of powers u/s.391 of Cr.P.C; such powers cannot be exercised to enable parties to fill up the lacuna. The evidence of accused is already closed.

14. Learned counsel for respondent has relied upon decisions in the case of (i) Milind Shripad Chandurkar Vs. Kalim M. Khan and another (2011)4-SCC-275, and (ii) Rambhau and another Vs. State of Maharashtra (2001)4-SCC-759.

15. The alleged transaction was executed between M/s.K.K.Links and accused. The complaint was filed by M/s.K.K.Links. The title of the complaint indicate that it is filed through its proprietor Deepak Lohana. The complaint states that complainant is proprietory concern. The MOU was executed between M/s.K.K.Links and accused. Cheque was issued in favour of K.K.Links. Deepak Lohana filed affidavit of evidence on behalf of complainant. In the cross-examination he stated that he has not filed any document to show that he is proprietor of K.K.Links. Even then he did not produce any document. The Trial Court has observed that till the decision, no document was produced. Relying on the decision of Hon'ble Supreme

Court, the Trial Court held that no document is placed on record to show that Deepak Lohana is proprietor of M/s.K.K.Links.

16. The issue in the present case is that document relating to establishing the fact that Deepak Lohana is the proprietor of M/s.K.K.Lines has not been filed on record. The complaint was filed without said document on record. In the case of Milind Shripad Chandurkar (supra), the Apex Court had observed that if the person is sole proprietor, he has to produce the proof to establish his locus standi to file complaint. Having failed to establish that Appellant was the proprietor of the firm concerned, he had no locus standi to file complaint u/s.138 of N.I.Act. Present case is identical. Appellant has failed to establish that he was proprietor of M/s.K.K.Lines.

17. The decision in the case of Bhupesh Rathod Vs. Dayashankar Prasad Chaurasia and another, the complaint was filed by appellant. Complaint was accompanied by board resolution authorizing the appellant to initiate legal action against respondent on behalf of the company. The company filed affidavit through appellant who was Managing Director stating that it had authorized him by board resolution to file a complaint. The Trial Court acquitted the accused. One of the ground was that board resolution was not signed by the Board of Directors. Complainant filed appeal in High Court. In the appeal High Court observed that it could not be said that complaint had been filed by a payee or holder in due course as mandated u/s.142(a) of the N.I.Act. The payee was the company and complaint did not show that complaint was filed by the company. It was filed by appellant who had described himself as Managing Director of the company only in the cause title of the complaint. Probably a conscious choice was made not to file the complaint in

the name of the company as it was unclear whether the company was authorized to advance loans. The Hon'ble Supreme Court held that the Managing Director has filed the complaint on behalf of company. There could be a format where the company's name is described first, suing through the Managing Director but there cannot be fundamental defect merely because the name of the Managing Director is stated first followed by the post held in the company. Copy of board resolution was filed along with the complaint. Affidavit was on record in the Trial Court filed by company affirming to the factum of authorization in favour of Managing Director. A Manager or a Managing Director can be taken to be the person in-charge of the affairs of company for its day to day management and within the activity would be calling the act of approaching the court for setting trial in motion. It would be technical view to defeat the complaint merely because the body of the complaint does not elaborate upon authorization. The artificial person being the company had to act through person/official, which logically would include the Chairman or Managing Director. Only the existence of authorization could be verified. The resolution authorizes the appellant to file complaint. The format is not defective. Thus, the decision is based on facts of the case which cannot be applied to the present case.

18. In the case of Rambhau and another (supra) it is observed that Section 391 of Cr.P.C enable the Appellate Court to receive additional evidence. However, it is not intended to fill up the gap in the prosecution and to cause prejudice to the accused but to oversee that concept of justice prevails.

19. From the proceedings it is apparent that complainant had

sufficient opportunity to adduce such evidence indicating that Deepak Chandulal Lohana is the proprietor of M/s.K.K.Lines. At this stage permitting appellant to file document and/or to remit the matter back to Trial Court when evidence is closed, would amount to to filling up lacuna. I do not find any reason to interfere in the impugned Judgment and Order passed by Trial Court.

ORDER

(i) Criminal Appeal No.814 of 2014 is dismissed.

(PRAKASH D. NAIK, J.)

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