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

CRIMINAL APPLICATION NO.397 OF 2023
IN
CRIMINAL APPEAL (ST.) NO.2770 OF 2023

(M/s. Ronghe Sales Vs. R.S. Construction, thr. its partners.)

Office Notes, Office Memoranda of Coram, appearances, Court's Orders or directions and Registrar's order	Court's or Judge's Order

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Mr. B.M. Kharkate, Advocate for the appellant.
Mr. G.K. Bhusari, Advocate for the respondents.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- OCTOBER 7, 2024

By preferring this application, the applicant is seeking leave to prefer an appeal against acquittal passed in S.C.C. No.5529/2019 dated 13-01-2023.

2. The appellant is the original complainant who has filed the complaint under Section 138 of the Negotiable Instrument Act, 1881 through his Power of Attorney Holder.

3. As per the contention of the complainant, the complainant is the wholesale Distributor of Sintex plastic tanks, Paras SWR fitting, Cera fitting and agricultural pipes etc. It has supplied the various types of material between April 2017 to March 2018 to the accused and the amount of Rs.3,95,673/- was due from the accused. On demand the accused issued the Cheque bearing No.024082 dated 15-11-2018 of Rs.50,000/- and the

Cheque bearing No.028493 dated 27-11-2018 of Rs.1,53,757/-, both drawn on Allahabad Bank, Manewada Road, Nagpur. Said cheques was deposited by the complainant in his account but it was returned with an endorsement “Exceed Arrangement” vide Cheque Return Memo dated 28-11- 2018. Therefore, the complainant issued the Demand Notice to the accused on 11-12-2018 which was received by the accused on 13-12-2018. But after receipt of the notice also accused failed to pay the amount and hence the complaint.

4. In support of the allegation, the complainant has examined the Power of Attorney Holder - Yogesh Ambir Ramteke and also relied upon the documentary evidence. The accused has tried to establish the defence through the cross-examination. Learned trial Court held that in view of Section 142 of Negotiable Instrument Act which mandates that complaint under Section 138 of the N.I. Act can be made by the payee or the holder in due course of the cheque. In the present case, the cheque was issued in the name of complainant M/s. Ronghe Sales, which is a proprietary concern of Dnyaneshwar Ronghe. Dnyaneshwar Ronghe. Said Dnyaneshwar Ronghe has given the Power of Attorney in favour of Yogesh Ramteke. It is observed by the trial Court that there should be specific assertion as to the knowledge of the power of attorney holder about the transaction in the complaint and the power of attorney holder who has no knowledge

regarding the transactions cannot be examined as a witness unless he is having a personal knowledge. At the same time, trial Court has considered whether there was a legal and enforceable debt and observed that as there was no averment that the Power of Attorney Holder was having knowledge about the transaction, and therefore, he is competent witness for the complainant and dismissed the complaint by acquitting the accused.

5. Being aggrieved and dissatisfied with the same, present application along with the appeal is preferred for grant of leave to file appeal.

6. Heard learned Counsel for the appellant who reiterated the contention that the appellant has filed the complaint through Power of Attorney Holder. He has examined his Power of Attorney who was having knowledge about the transaction but learned trial Court has wrongly held that there is no averment in the complaint. Thus, there is an apparent error and the evidence is appreciated in erroneous manner. In view of that, leave is to be granted to the appellant to prefer an appeal.

7. Learned Counsel for the accused vehemently submitted that the averment in the complaint as to the knowledge of the Power of Attorney Holder is an essential ingredient unless that averment is there the Power of

Attorney Holder cannot be a competent witness. In view of that, the view taken by the learned trial Court is correct and no interference is called for.

8. I have heard learned Counsel for both the parties. Perused the impugned judgment. Entire issue revolves whether Power of Attorney Holder is a competent witness or not and whether in absence of the averment that he is having sufficient knowledge about the transaction whether complaint is maintainable or not.

9. Learned trial Court has considered the judgment of ***A.C. Narayanan Vs. State of Maharashtra [(2014) 11 SCC 790]*** wherein the aspect of whether the Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint is dealt with. It is held that 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. It is further held that 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. While interpreting the Section 142A of the Negotiable Instrument Act, the Hon'ble Apex Court in the said case considered Order 3 Rules 1 and 2 Civil Procedure Code

which empowers the holder of power of attorney to 'act' on behalf of the principal. It is held by the Hon'ble Apex Court in the case of ***Janki Vashdeo Bhojwani and Anr. vs. Indusind Bank Ltd. and Ors. [2005 (2) SCC 217]*** by referring the judgment of this Court in ***Pradeep Mohanbay vs. Minguel Carlos Dias [2000 (1) Bom. L.R. 908]*** wherein it is held that Order 3 Rules 1 and 2 CPC empowers the Order 3 Rules 1 and 2 CPC empowers the holder of power of attorney to 'act' on behalf of the principal. In our view the word 'acts' employed in Order 3 Rules 1 and 2 CPC confines only to 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 of 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.

10. By referring the various judgment the Hon'ble Apex Court held that powers of Power of Attorney under the Code of Civil Procedure, 1908 and it was concluded that a complaint by a power of attorney holder on behalf of original plaintiff is maintainable provided he has personal knowledge of the transaction in question. In a

way, it is an exception to a well settled position that criminal law can be put in motion by anyone and under the Statute, one stranger to transaction in question, namely, legal heir etc., can also carry forward the pending criminal complaint or initiate the criminal action if the original complainant dies. Keeping in mind various situations like inability as a result of sickness, old age or death or staying abroad of the payee or holder in due course to appear and depose before the Court in order to prove the complaint, it is permissible for the Power of Attorney holder or for the legal representative(s) to file a complaint and/or continue with the pending criminal complaint for and on behalf of payee or holder in due course. However, it is expected that such power of attorney holder or legal representative(s) should have knowledge about the transaction in question so as to able to bring on record the truth of the grievance/offence, otherwise, no criminal justice could be achieved in case payee or holder in due course, is unable to sign, appear or depose as complainant due to above quoted reasons. By keeping these aspects in mind, the Apex Court had taken the view that if complaint is filed for and on behalf of payee or holder in due course, that is good enough compliance with Section 142 of N.I. Act. The power of attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee, the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor, and the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor. However, we make it clear that the power of attorney holder cannot file a complaint in his own name as if he was the complainant. In other words, he can initiate criminal proceedings on behalf of the principal. It is further considered that from a conjoint reading of Sections 138, 142 and 145 of the N.I. Act as well as Section 200 of the Code, it is clear that it is open to the Magistrate to issue process on the basis of the contents of the complaint, documents in support thereof and the affidavit submitted by the complainant in support of the complaint. Once the complainant files an affidavit in support of the complaint before issuance of the process under Section 200 of the Code, it is thereafter open to the Magistrate, if he thinks fit, to call upon the complainant to remain present and to examine him as to the facts contained in the affidavit submitted by the complainant in support of his complaint. However, it is a matter of discretion and the Magistrate is not bound to call upon the complainant to remain present before the Court and to examine him upon oath for taking decision whether or not to issue process on the complaint under Section 138 of the N.I. Act. For the purpose of issuing process under Section 200 of the Code, 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. It is only if and where the Magistrate, after considering the complaint under Section 138 of the N.I. Act, documents produced in support thereof and the verification in the form of affidavit of the complainant, is of the view that examination of the complainant or his witness(s) is required, the Magistrate may call upon the complainant to remain present before the Court and examine the complainant and/or his witness upon oath for taking a decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

11. In the light of the above observation, 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.

12. In view of the above discussion in the present case, the attorney holder can file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal and he can act as a witness when he is having a personal knowledge about the transaction and there should be an averment in the complaint that he is having complete knowledge about the transaction, and therefore, he is deposing on behalf of the complainant. In the present case, this averment is absent. Learned trial Court has rightly considered the same and rightly dismissed the complaint as the evidence of the complainant who is examined as a Power of Attorney and there is no averment that he is having personal knowledge about the transaction, therefore, the view taken by the learned Magistrate is a plausible view, and therefore, no case is made out for grant of leave.

13. Hence, the application for grant of leave is hereby rejected.

(URMILA JOSHI-PHALKE, J.)

**Divya*