

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 85 OF 2015

Nilkanth s/o Vaijnathrao Dange

APPLICANT

VERSUS

Kerba Sakharam Kutaphale
and another

RESPONDENTS

Mr. S.K. Chavan, Advocate for the applicant
Mr. G.K. Munneshwar, A.P.P. for respondent no.1
Mr. N.T. Bhagat, A.P.P. for respondent no.2/State

CORAM : M.T. JOSHI, J.

DATE : 21/11/2015

ORAL ORDER :

1. Heard both sides.
2. Aggrieved by the acquittal of respondent no.1 from the offence punishable under section 138 of the Negotiable Instruments Act, by the learned Judicial Magistrate First Class, Aundha (Nagnath), District Hingoli in Summary Criminal Case No. 1376/2008, the original complainant/present applicants wants to prefer an appeal and therefore, the present application for grant of leave to file appeal is filed.

3. The applicant/complainant's case before the learned Judicial Magistrate First Class, in short, was as under:-

. That, the applicant/complainant is a pigmy agent. The respondent no.1 – Kerba is proprietor of a shop. Therefore, the applicant and respondent no.1 had relations with each other. On 1st November, 2007, the respondent no.1 was in need of money for some work in his land. Hence he demanded an amount of rupees five lacs from the applicant/complainant and assured that he would repay the same before 27th December, 2007. Accordingly, the applicant/complainant paid him an amount of rupees five lacs as hand-loan, against which the disputed cheque was passed by the respondent no.1/accused. The same was, however, dishonoured on due date. Therefore, statutory notice was issued to the respondent no.1/accused which was served on him and as no payment was made by him, the complaint was filed by the applicant/complainant.

4. The defence of the respondent no.1/accused was that as the complainant was pigmy agent and as the

respondent no.1/accused was depositing an amount with the complainant on some occasions, he had given cheques to the complainant to withdraw amount from the very bank. In all these transactions, one cheque remained with the complainant. The complainant by taking undue advantage of the said cheque, put his name and figure in the said cheque and after dishonour thereof, the present false complaint is filed.

5. The learned Judicial Magistrate First Class framed the charge. The applicant adduced the evidence of himself and PW2 – Bandu Dhoble and other witnesses to prove the factum of sending notice, return of cheque etc. No evidence was adduced by the respondent no.1/accused.

6. The learned Judicial Magistrate First Class, while delivering the judgement, framed the points to find out as to whether the applicant/complainant has proved beyond reasonable doubt the fact that the disputed cheque was issued to the complainant towards satisfaction of any legal debt. The learned Judicial

Magistrate First Class has thereafter appreciated the evidence to find out as to whether the presumption that has arisen due to passing of the cheque is rebutted and ultimately, observed that the complainant failed to prove his case beyond reasonable doubt and therefore, respondent no.1/ accused came to be acquitted.

7. Mr. S.K. Chavan, learned counsel for the applicant/complainant submitted that the total approach of the learned Judicial Magistrate First Class of casting the burden of proof beyond reasonable doubt of consideration of cheque on the complainant was wrong in view of the fact that due to passing of the cheque, a presumption has arisen that the said cheque was issued towards the satisfaction of a legally enforceable debt. He, therefore, submitted that since learned Judicial Magistrate First Class misled himself in appreciation of evidence by taking a wrong approach, leave to file an appeal may be granted.

8. On the other hand, Mr. G.K. Munneshwar, learned counsel for the respondent no.1/accused submitted that

though the framing of point may be somewhat defective on the part of learned Judicial Magistrate First Class, the appreciation of evidence on the record made and the observation of learned Judicial Magistrate First Class would show that the learned Judicial Magistrate First Class has discussed the evidence to find as to whether the presumption is rebutted. He further submitted that in fact also, the presumption is rebutted and therefore, since reasonable and probable view has been taken in the matter, leave to file an appeal may not be granted.

9. Upon hearing both sides, in my view, the applications deserves to be rejected, for the reasons to follow:

R E A S O N S

10. The learned Judicial Magistrate First Class, no doubt, has framed the points to find out as to whether the present applicant/complainant has proved beyond reasonable doubt that the respondent no.1/accused had issued disputed cheque to the complainant towards satisfaction of a legal debt. The discussion, however

would show that the learned Judicial Magistrate First Class was aware that the presumption has arisen due to passing of the cheque and therefore, material on record was taken into consideration to find out as to whether the said presumption was rebutted. The fact that the applicant/complainant is merely a pigmy agent without having any substantive income, was taken into consideration. Further, against the case that in the year 2007, though the applicant claimed to be in the business of plotting, he was not paying any income tax and therefore, he could have given an amount of rupees five lacs as hand loan to the respondent no.1/accused, was held to be not plausible. Further, the statement of the applicant/complainant that out of said amount of rupees five lacs, he had brought an amount of rupees two lacs from one Jambhle sir, was taken into consideration. The non examination of said Jambhle was commented upon. Further, certain variance in the evidence was taken into consideration. Further, the ratio laid down by this Court in the case of **Mohammad Raffeeque s/o Aboo Backar Vs. M.Abdulla s/o Mohiddin Kunhi Haji & Another**, reported in **2008 ALL M.R.(Cri) 2780**, wherein it was

observed that the presumption can be rebutted on the basis of the evidence of the complainant about the capacity of the complainant to pay the amount under the cheque can also be considered, was taken into consideration by the learned Judicial Magistrate First Class.

. In that view of the matter, in my view, since reasonable and probable view on the basis of material on record is taken by the learned Judicial Magistrate First Class, grant of leave to file an appeal would be an exercise in futility. Hence the following order.

11. The application is hereby rejected.

[M.T. JOSHI]
JUDGE

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