

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 449 OF 2015

Azam J. Shaikh

.. Applicant

v/s.

Haseena Inamdar & Ors.

..Respondents

Mr. Rohan H. Barge for the Applicant.

Mr.H.J.Dedhia, APP for the State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : OCTOBER 17, 2015.

P.C.

1. This is an application under Section 378 (4) for leave to appeal against the judgment dated 6.5.2015 whereby the learned Judicial Magistrate, First Class, CBD-Belapur, Vashi, Navi Mumbai has acquitted the respondent no.1 for offence under Section 138 of the N.I.Act.

2. The applicant who was the complainant in the said case had lodged complaint under Section 138 of the N.I.Act, alleging that he had advanced friendly loan of Rs.2 lakhs to the respondent no.1. It is

stated that the respondent no.1 had executed a promissory note dated 30.7.2012 wherein she had acknowledged having received the said loan and assured to repay the same. It is further stated that the respondent no.1 had issued him cheque dated 16.11.2012 for Rs.2 lakhs towards repayment of the said loan. The said cheque was presented in the bank, but was dishonoured. The complainant had issued statutory notice and had called upon the respondent no.1 to pay the cheque amount. The respondent having failed to pay the cheque amount, the applicant filed proceeding under Section 138 of the Negotiable Instruments Act.

3. Upon being served with the summons, the respondent no.1 put in her appearance and stepped into the witness box and claimed to be tried. The applicant examined himself and another witness. After considering the evidence adduced by the applicant, the learned Magistrate held that the respondent had rebutted the presumption that the subject cheque was given for consideration. The learned Magistrate therefore held that the applicant had failed to prove that the cheque was issued towards legally enforceable debt and hence

the ingredients of Section 138 of the N.I.Act was made out, and based on these finding, the learned Magistrate acquitted the accused under Section 138 of the Negotiable Instruments Act.

4. With the assistance of the counsel for the applicant, I have gone through the notes of evidence. I have perused the impugned order. In the complaint under Section 138 of the N.I.Act, the applicant had stated that he had advanced to the respondent loan of Rs. 2 Lakhs and that the respondent had issued the subject cheque towards repayment of the loan. The defence of the respondent was that the applicant is a money lender and that she had requested him for a loan of Rs.50,000/-. She had stated that the applicant had taken blank cheques and a stamp paper for advancing the said loan. She has stated that the applicant did not avail the said loan, and the complainant misused the cheque and the stamp paper.

5. The subject cheque is admittedly signed by the respondent no.1. The presumption under Section 139 is therefore that the cheque was issued for consideration. The question which therefore

arises is whether the presumption under Section 139 has been rebutted. In this regard, it is to be noted that though the applicant had stated that he had advanced to the respondent loan of Rs.2 lakhs, he has admitted in his cross examination that he did not have the money to give loan to the applicant. He claims that he had taken loan from his friend for advancing the money to the respondent. The applicant had not given any such details in the complaint. He had also not given the date on which the said loan was advanced. The applicant had examined PW2 Nitin Kandhari who had claimed that he had advanced the money to the applicant in four installments. This statement is not consistent with the statement of the applicant. It is also to be noted that the applicant had stated that there was no writing between him and the PW2 regarding the said loan transaction. PW2 has however given a different version and claimed that he and the applicant had entered in writing in respect of the said loan. Furthermore, the complainant does not disclose the name of PW2 either in the complaint or in the list of witnesses. The said witness, therefore, appears to be a got up witness. In the light of the principle laid down by the Apex Court in the case of

M.S.Narayana Menon v. State of Kerala (2006) 6 SCC 39 and holding that the defence of the respondent-accused was probable, acquitted the accused. The finding of the trial Judge is neither illegal nor perverse. No interference was warranted. Hence, application is dismissed.

(ANUJA PRABHUDESSAI, J.)