IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.476 OF 2013

AFZAL R. HUSAIN SHAIKH)...APPLICANT

V/s.

SANJAY GANGARAM BIRJE & ANR.)...RESPONDENTS

Mr.A.M.Moorthy i/b. Bafna Law Associates, Advocate for the Applicant.

Mr.Prakash V. Vare, Advocate for Respondent No.1.

Mr.Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 2nd FEBRUARY, 2015.

<u>P.C.</u> :

1 The applicant is the original complainant, who had prosecuted respondent no.1 herein, on the allegation of having committed the offence punishable under Section 138 of the Negotiable Instruments Act. The learned Magistrate, 55th Court,

Mazgaon, after holding a trial, acquitted respondent no.1. Being aggrieved thereby, the applicant has approached this court by the present application, seeking leave to file an appeal against the said order of acquittal.

2 I have heard Mr.A.M.Moorthy, the learned counsel for the applicant, at length. I have also heard Mr.Prakash Vare, the learned counsel for respondent no.1, in brief. For the sake of convenience and clarity, the applicant shall hereinafter be referred to as 'the complainant' and respondent no.1 as 'the accused.'

3 The complainant's case, as per the complaint, was to the effect that he had, from time to time, advanced various sums in cash to the accused. They were advanced pursuant to request made by the accused to the complainant for a friendly loan of Rs.20 Lac. This request was supposedly made in the month of August 2010. In paragraph 4 of the complaint, the complainant has given the details of the payments made by him in cash to the accused. The case of the complainant was that, towards the

repayment of such loans taken from time to time, which totally amounted to Rs.16 Lac, the accused had issued the cheque in question, which was dishonoured, and which resulted in the prosecution.

4 The defence of the accused was that, he had not taken any loan from the complainant. According to him, the accused had some transaction with the brother of the complainant and was liable to repay an amount of Rs.5Lac to the complainant's brother. According to the accused, it is in connection with that transaction, that a blank signed cheque had been given by him to the complainant's brother, which was misused by the complainant.

5 I have carefully gone through the impugned judgment. I have also gone through the complaint, the evidence adduced during the trial, and more particularly, the cross-examination of the complainant.

6 It may be observed that the complaint makes some assertions, which are, admittedly, incorrect. These are to the effect that the cheque had been issued in favour of the complainant's firm, that there were sales invoices, which references are, admittedly, wrong. Anyway, since the complainant was not questioned about it in the cross-examination, I am not inclined to give much importance to that.

7 The story of the complainant having paid some amounts in cash to the accused from time to time, has its own weaknesses, but even otherwise, the complainant in the cross-examination admitted that some of the amounts, which he claims to have given to the accused, were actually given to his servant Mohd.Siddique. The Magistrate observed that, it was not the case of the complainant, that, these amounts were paid to the complainant through Mohd.Siddique, and that, if these amounts were deducted, there would be nothing to show that an amount of Rs.16 Lac had been given by the complainant to the accused.

8 The complainant places reliance on a document, which according to him, was executed by the accused acknowledging the receipt of the amount of Rs.16 Lac. This document was produced before the court, but the learned Magistrate did not believe this. The accused had taken a stand that he had not signed the said document, and that, the signature claimed to be his, was actually not his. The document shows that there were two attesting witnesses, but admittedly, none of them was examined by the complainant during the trial, inspite of a categorical and specific denial of the execution of the document by the accused. Moreover, this document is not in conformity with the facts of the case, as stated by the complainant. According to the complainant, the transaction was in respect of a friendly loan, but this document shows that interest at the rate of 2% was payable by the accused to the complainant. The document also suggests that the cash had been received on the day of the said agreement, i.e., 2^{nd} April, 2011, whereas, the case of the complainant, as made out in the complaint, was to the effect that cash payments were made from time to time commencing from 2^{nd} September, 2010.

9 The doubt felt by the learned Magistrate about the truth of the complainant's case appears to be proper and justified. The order of acquittal, as passed by the Magistrate, therefore, cannot be said to be wrong, illegal or contrary to law. In any case, the view of the matter, as taken by the Magistrate, is a possible view of the matter.

10 It is well settled that, when such is the case, grant of leave would be futile.

11 Leave refused.

12 The application is rejected.

(ABHAY M. THIPSAY, J.)