

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 1667 OF 2015

Nafis Poultry Farm, Through
Rafiq Sikandar Shaikh

..APPLICANT

VERSUS

Kabir Chicken and Eggs Shop,
For, Samir Khan Istrail Khan

..RESPONDENT

....

Mr. N.S. Jaju, Advocate h/f Mr. A.S. Bajaj, Advocate for applicant.
Mr. V.Y. Bhide, Advocate for respondent.

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**CORAM : INDIRA K. JAIN, J.
DATED : 1st APRIL, 2016**

ORDER :

1. Here is an application under Section 378(4) of the Code of Criminal Procedure for leave to appeal against the judgment and order dated 02.08.2014 passed by the learned Judicial Magistrate First Class, Sangamner in STC No. 857 of 2005. By the said judgment and order learned Magistrate acquitted the sole accused of the offence punishable under Section 138 of the Negotiable Instruments Act.

2. It is the case of complainant that there were business relations between him and accused since 8-10 years and applicant used to supply chicken to respondent. An amount of Rs.2,50,000/- was due

from respondent. On 02.07.2005 respondent issued a cheque of Rs.90,000/- towards part payment of dues. Said cheque was presented in the bank. It was dishonoured for want of sufficient funds. Legal notice was issued. As accused did not comply with the notice, complaint under Section 138 of the Negotiable Instruments Act was filed before learned Magistrate.

3. Particulars of offence were explained to the accused. He pleaded not guilty and claimed to be tried. Accused raised a specific defence that in 2003 he issued two blank cheques to complainant towards security. Those cheques were misused and he was falsely implicated.

4. During trial complainant examined himself and relied upon various documents. Accused did not examine himself or any other witness in support of his defence. Considering the evidence of complainant and the documents brought on record, Trial Court found that cheque in question was not issued in the discharge of legally enforceable debt and no liability can be fastened under Section 138 of the Negotiable Instruments Act. Being aggrieved by the judgment and order of acquittal present application for leave to appeal has been preferred.

5. Heard Mr. Jaju, learned Counsel for applicant and Mr. Bhide, learned Counsel for respondent. With the assistance of the learned Counsel for parties this Court has gone through the evidence of complainant, documentary evidence and the reasonings recorded by the Trial Court. It appears that complainant did not place on record extract of accounts of the relevant period. For non-production of relevant extract of accounts it was held that he could not prove legally enforceable debt against the accused.

6. It can be seen from evidence of complainant Rafiq Sikandar Shaikh that a receipt dated 17.07.2009 Exhibit 58 was produced during examination in chief. According to complainant during pendency of criminal case Rs.25,000/- were paid by accused to complainant as part payment against total dues of Rs.1,91,568/-. It is further submitted by applicant that in this receipt respondent has admitted in an unequivocal terms that amount was due towards legally enforceable debt. In view of this receipt it was not necessary for complainant to place on record the extract of accounts and so reasoning recorded by Trial Court that non-production of extract of accounts was fatal to complainant's case is absolutely against the record.

7. It can be seen from the cross-examination of complainant that receipt Exhibit 58 was not seriously challenged. There is no effective cross-examination of complainant on this receipt. Trial Court has not discussed anywhere in judgment that there was an admission of the debt on the part of accused. Considering the evidence of complainant and particularly receipt Exhibit 58, this Court finds that applicant has an arguable case on merits. Application thus deserves to be allowed. Hence the following order:

ORDER

- I) Criminal Application No. 1667 of 2015 is allowed.
- II) Leave to appeal granted.
- III) Admit appeal.
- IV) Action under Section 390 of the Code of Criminal Procedure.
- V) Issue notice to respondent.
- VI) Mr. Bhide, learned Counsel waives service of notice for sole respondent.
- VII) Criminal Application No. 1728 of 2015 shall be heard along with the appeal.

(INDIRA K. JAIN, J.)