

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

Criminal Application No. 2585 of 2015

District : Nandurbar

Balkrushna Somnath Lahoti,

Age : 64 years,

Occupation : Business,

R/o. Subhash Chowk, Nandurbar,

Taluka & District : Nandurbar.

.. Applicant

(Original complainant)

versus

Mr. Akeali Ashrafali (Kalumiya),

Age : Major,

Occupation : Business,

R/o. Taloda, Taluka : Taloda,

District : Nandurbar.

.. Respondent

(Original accused)

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Mr. Pramod D. Patil, Advocate, for the applicant.

Mr. Vinod P. Patil, Advocate, for the respondent.

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CORAM : N.W. SAMBRE, J.

DATE : 15TH MARCH 2016

COURT'S ORDER :

1. This is an application under Section 378 of the Code of Criminal Procedure 1973, seeking leave to file appeal against the order of acquittal recorded by the learned Judicial Magistrate (F.C.), Nandurbar, in

Summary Trial Case No. 1652/2003, vide judgment and order dated 7th March 2015, thereby acquitting present respondent - original accused of the offence punishable under Section 138 of the Negotiable Instruments Act 1881.

2. It is claimed by the applicant, that the applicant is in the business of supply of construction material to various contractors including that of the respondent herein. It is submitted that cheque Exhibit 89 dated 4th April 2003, bearing No. 1319113 came to be issued by the respondent to the applicant which presented and informed to be dishonoured for want of sufficient funds. The memo to that effect issued by the Bank dated September 11, 2003 was produced at Exhibit 91, whereas letter of the applicant's Bank to that effect is dated 12th September 2003 at Exhibit 90. He would submit that the notice under Section 138 of the Negotiable Instruments Act came to be issued on 26th September 2003 at Exhibit 92. The postal acknowledgment of the same is at Exhibit 93. He has also produced photo-copy of the cheque return register maintained by the Bank of the complainant, which is produced along with document list at Exhibit 113.

3. It is claimed that though the applicant filed Regular Civil Suit No. 15/2006 for recovery of the amount as mentioned in the cheque, however, the same came to be dismissed on 29th September 2006. The said judgment is at Exhibit 119.

4. In this background, Mr. P.D. Patil, the learned Counsel for the appellant, would submit that the presumption as is provided under the

Negotiable Instruments Act, that the cheque was issued for an admitted date, is not rebutted by the accused. According to him, the learned Magistrate has committed an error by shifting burden on the present applicant to prove that the cheque that was held by him was towards an admitted date. So as to substantiate his contentions, he has taken me through various observations made by the learned Magistrate in the judgment delivered in S.T.C. No. 1652/2003. According to him, the application deserves consideration.

5. Mr. V.P. Patil, the learned Counsel for the respondent - original accused, would submit that the learned Magistrate particularly having regard to the plea as was raised by the present applicant, as examined all facets of the matter in the background of evidence of the complainant, his witness who was the Bank employee and thereafter, in the light of the oral and documentary evidence has acquitted the present respondent. He submits that the application lacks merit and the same be dismissed.

6. From the record, it depicts that though the applicant has placed on record copy of the original cheque which was dishonoured along with written memo issued by the Bank and acknowledgment with the copy of the notice, the learned Magistrate has taken judicial note of the fact that the suit that was initiated for recovery of the said amount, vide Regular Civil Suit No. 15/2006 was already dismissed by the Court on September 29, 2006 at Exhibit 119. Apart from above, the complainant has claimed that he keeps entries of the business transactions in the books of account maintained by him and the same is also reflected in the income tax papers.

The case of the complainant is that the goods are sold on credit to the contractors. So as to ensure the payment, cheques were taken as a guarantee and there is a record maintained about such cheques.

7. The learned Magistrate has noted that the cheque deposit receipt was not produced. However, the complainant's witness No.2 Mr. Mahire, a Bank employee, has tried to support the case of the complainant by producing the original register maintained by the Bank towards entry of cheques which were presented for encashment. The learned Magistrate then noted that there was no entry of the cheque which was presented by the present applicant issued by the respondent herein in the said register. The contents of the said register were duly appreciated by the learned Magistrate. There is one more aspect of the matter, that the transaction claimed to have been held on April 4, 2003 against the cheque in question was issued towards guarantee. Though it is claimed that the entry regarding the said transaction in the books of account maintained by the complainant was made, however, in view of the denial by the account about his liability to pay the amount, the said issue was not at all proved by the complainant particularly by adducing sufficient evidence to that effect. The applicant has not produced the credit memo of the transaction in question nor any documents to substantiate the claim that the goods were given on credit to the accused person for an amount of Rs. 81,600/-.

8. The learned Magistrate has taken into account all facets of the matter and also gone into the issue of presumption as sought to be relied upon by the applicant. In my opinion, in the background of above, the acquittal as is ordered, does not call for any interference.

9. In the result, the Application is dismissed. Leave to file appeal is refused. The Application accordingly stands disposed of.

(N.W. SAMBRE)
JUDGE

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