IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.4107 OF 2015

Nandkishor s/o Babanrao Satpute,
Age: 53 years, Occ: Business,
R/o. Main road, Georai,
District Beed. ..APPLICANT

VERSUS

Mr. Dhananjay s/o Vyankatbua Goswami,
Age: Adult, Occ: Agri.,
R/o.Vitthal Mandir, Old Chowk
Monda, Tq & Dist. Beed & anr. ..RESPONDENTS

Mr H.P. Kshirsagar, Advocate for applicant;
Mr R.V. Dasalkar, A.P.P. for respondent No.2

CORAM : N.W. SAMBRE, J.

DATE : 19th SEPTEMBER, 2016

ORDER :

Present applicant is the original complainant in Summary Case No. 556 of 2008 initiated in the Court of learned Judicial Magistrate, First Class, Georai, District Beed. In the complaint, it is claimed by present applicant that he gave handloan of Rs.2,50,000/- to respondent No.1-accused on 10th January, 2008 and on the same day, the accused issued cheque towards security and repayment. The cheque issued by the accused was returned along with intimation on 22nd April, 2008 as 'funds insufficient', as consequence, he issued notice under Section 138 of the Negotiable Instruments Act on 6th May, 2008.

2. In support of the complaint, the complainant has examined himself at Exhibit-30 and relied upon the cheque at Exhibit-37, bank memo at Exhibit-38, cheque return memo at Exhibit-39, copy of notice at Exhibit-40, envelope containing notice which was returned at Exhibit-41. The complainant examined one Momeen Shakiyho0ddin Ismoddin, an employee of Dwarkadas Mantri Sahakari Bank, Branch Beed as his witness No.2 at Exhibit-86 and relied upon account extract of the accused at Exhibit-87, extract of cheque book return register at Exhibit-88. Along with the above referred documents, the complainant has also relied upon other documentary evidence.

3. Learned Magistrate, after considering rival claim, has dismissed the complaint and acquitted the accused under Section 138 of the Negotiable Instruments Act. As such, present application seeking leave to file appeal.

4. While relying upon the grounds raised in the application, Mr. Kshirsagar, learned Counsel for the applicant would submit that learned Magistrate has failed to appreciate the evidence of complainant and his witness in true perceptive. He would then invite attention of this Court to the statement of accused recorded under Section 313 of the Code of Criminal Procedure so as to submit that only inference that could be drawn is the cheque was issued for an admitted debt.

5. According to him, once the cheque was issued by the accused, the burden is on him pursuant to the Sections of 138 and 139 of the Negotiable Instruments Act and sought to grant leave to file appeal.

6. Respondent No.1 though served, none appears.

7. *Prima facie,* upon perusal of the judgment of the acquittal and other material pressed into service for seeking leave takes this Court to the only inference that there is no case made out for grant of leave for the following reasons.

8. It is the case of present complainant that amount of Rs.2,50,000/- was advanced by him to the respondent-accused in cash on 10th January, 2008 and on the very same day, the accused has given crossed cheque to him towards repayment of the same.

9. It is required to be noted that though learned Counsel for the applicant was right in pointing out that there is presumption in favour of the present applicant that the cheque was issued for an admitted debt, however while ascertaining

the source of such amount, which was claimed to have been arranged by the applicant for giving hand loan to the accused, there is hardly any evidence to that effect. Neither the bank account extract or income tax return is produced on record so as to demonstrate that such huge amount of Rs.2,50,000/- was advanced by the present applicant to the accused so as to *prima facie* infer that the amount was given as hand loan to the accused. Apart from above, the very interesting factor was brought on record by the accused is that present applicant being named as nominee in the form for opening bank account which was tendered by the bank. There is hardly any explanation forward so as to accept relationship of present applicant with accused, which prompted to name the accused as nominee in the account opening form with bank. The was formed to be basis so as to infer that the transaction in question was not hand loan transaction.

10. Apart from above, learned Magistrate taking shelter of provisions of Bombay Money

Lending Act, 1946 has observed that it is not legally enforceable debt. Once it is observed that it is legally enforceable debt, learned Magistrate has rightly shifted the burden upon the present applicant. The acquittal ordered in the present case, in my opinion, is just and proper. No case for grant of leave to file appeal is made out. As such, leave to file appeal is refused. The application fails and same stands rejected.

(N.W. SAMBRE, J.)

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