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

CRIMINAL APPLICATION NO. 5639 OF 2015

Vithal s/o Madhukarrao Labhsetwar,
Age: 50 years, Occupation: Business,
Proprietor of M/s Tirupati Trading Company,
Naigaon-Bazar, Taluka Naigaon Kh.,
District Nanded, R/o. Naigaon-Bazar,
Taluka Naigaon Kh. District Nanded

..APPLICANT
(Orig. complainant)

VERSUS

Madhukar s/o Gangaram Gadewar,
Age: Major, Occupation: Business,
Proprietor M/s. Rajkumar Traders,
Sujlegaon, R/o. Sujlegaon,
Taluka Naigaon Kh.,
District Nanded

..RESPONDENT
(Orig. accused)

Mr A. R. Vaidya, Advocate for applicant;
Mr S. G. Nandedkar, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 27th September, 2016

ORAL ORDER :

In Summary Criminal Case No.384 of 2011, initiated by the present applicant, learned Judicial Magistrate First Class, Naigaon Bazar, acquitted the respondent-accused of offence punishable under section 138 of the Negotiable Instruments Act, by judgment and order dated 14th August, 2015. Thus, the present application seeking leave to appeal.

2. Mr Vaidya, learned Counsel appearing on behalf of the applicant-original complainant, while trying to make out a case for grant of leave, would invite attention of this Court to the very conduct of the of respondent-accused of not acting *qua* the business transaction between the parties,

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particularly in the matter of recovery of amount outstanding, as is claimed by the accused. He would then urge that in absence of account books of both the parties, the learned Magistrate should have taken recourse to the provisions of Section 139 of the Negotiable Instruments Act and should have presumed that there was a liability on the respondent-accused to honour negotiable instrument in question.

3. Per contra, Mr Nandedkar, learned Counsel appearing on behalf of the respondent submits that the order of acquittal as recorded by the learned Magistrate is well reasoned and based on cogent evidence. He would submit that the burden/presumption as contemplated under Sections 118 and 139 of the Negotiable Instruments Act is appropriately discharged by the respondent-accused and it was the duty of the present applicant-complainant to prove the liability beyond reasonable doubt.

4. Having considered the rival submissions, it is required to be noted that the respondent-accused, pursuant to the claim in the complaint and the notice issued after dishonour of the cheque, has come out with a defence that the amount was already repaid by entering into certain business transaction *qua* sale of black and green gram. The learned Magistrate then considered the claim as is sought to be espoused through Exh. 40 – a notice demanding the amount by the complainant and stand taken by the respondent-accused, vide Exh. 42 – reply to the said notice issued by the accused at Exh. 43 dated 28th March, 2012 after the payment of Rs. 7,96,000/- towards the sale of black gram, demanding amount of

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Rs. 6,04,800/- towards the sale of green gram was considered to be a basis for discharging presumption/burden on the accused. In addition to above, the other evidence viz. Exh. 74 – letter issued to Rajkumar Traders containing acknowledgement of Godown Manager about delivery of 100 bags of black gram of 100 Kg. each; Exh. 75 – letter dated 8th October, 2010 on behalf of Rajkumar Traders acknowledging the said letter and further acknowledging receipt of 92 bags of black gram, notice dated 5th September, 2012 issued on behalf of Buldhana Urban Credit Co-operative Society depicting that 192 gunny bags of black gram were kept in the godown vide two receipts and those were taken by Tirupati Trading on 6th August, 2011, which *prima facie* demonstrates the only inference that 192 gunny bags of black gram were sold for satisfaction of the debt as is sought to be enforced by the complainant. The learned Magistrate then considered oral evidence of the respective parties and in my opinion, rightly acquitted the respondent-accused. Upon reading of overall evidence of the respective parties including that of oral and documentary, the cumulative effect as could be inferred is, the respondent-accused has already discharged his burden and the learned Magistrate was right in law in acquitting the accused.

5. In view thereof, no case for grant for leave is made out. Leave, as such, is refused. Criminal application stands rejected.

(N.W. SAMBRE, J.)

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