

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

CRIMINAL APPLICATION NO.5833 OF 2015

Shankar s/o Dhondiram Ghatge ... APPLICANT

VERSUS

Ganesh s/o Vishwanath Kakade ... RESPONDENT

.....
Shri S.S. Gangakhedkar, Advocate for applicant
Shri P.S. Pawar, Advocate for respondent
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CORAM: A.I.S. CHEEMA, J.

DATED: 4th May, 2016.

ORAL ORDER :

1. Heard learned counsel for the applicant and learned counsel for the respondent - accused. Perused record.

2. It is stated on behalf of the learned counsel for the applicant - complainant that, the trial Court has erred in acquitting the accused. According to the counsel, because of near relations between the parties, which fact was not in dispute, hand loan was given to the accused and the cheque issued by the accused bounced, because of which the criminal prosecution was required to be filed. The learned counsel stated that, the trial

Court accepted the defence of the accused that in some other transaction, the accused had mediated in the said transaction of the land of the applicant and in that context, the cheque had been issued and it was merely a security of the said transaction and that cheque was misused. According to the counsel, even if one was to say that by way of security the cheque was given, that would be also legally enforceable debt.

3. The learned counsel further submitted that, the trial Court held that, notice was not duly served, but trial Court did not consider the judgment of the Hon'ble Supreme Court, which has been passed in the matter of **C.C. Alavi Haji Vs. Palapetty Muhammed**, reported in **AIR 2007 (Supp) 1705** regarding option to pay in 15 days of receipt of summons with copy of complaint. It is further stated that, the trial Court relied on the judgment in the matter of **Krishna Janardhan Bhat Vs. Dattatraya G. Hegde** reported in **2008 ALL MR (Cri) 1164** with regard to discharging burden of proof which is on the accused and the preponderance of probabilities. According to the learned counsel, the judgment was found by the Hon'ble Supreme Court to be in conflict with the statutory provisions, as can be seen in para 11 of the judgment of the Hon'ble Supreme Court in the matter of **Rangappa Vs. Shri Mohan** reported in

A.I.R. 2010 SC 1898. Thus, according to the counsel, there is arguable case and the application needs to be allowed.

4. Counsel for the respondent submitted that, the trial Court rightly appreciated the evidence and it has been proved that the notice was not served as the address was incomplete. According to the counsel, the transaction between the complainant and the accused was not established and the complainant had failed to prove that there was a debt outstanding against the respondent - accused. Thus, according to him, the reasonings of the trial Court are correct and proper.

5. Counsel for the complainant has argued that, the complainant had filed Account extracts at Exhibit 36, in the trial Court and the transaction between the parties had been recorded in the Accounts and shown to the Income Tax authorities.

6. Looking to the above factors, which have been brought before me and the submissions of the learned counsel of the applicant - complainant, there appears to be an arguable case, which requires to be considered.

7. This being so, the application is allowed. The application is converted into appeal.

8. The appeal is **admitted**.
9. Printing dispensed with. Paper Book be got prepared.
10. Mr. Pawar, learned counsel waives service of notice for respondent after admission of the appeal.
11. Action under Section 390 of the Code of Criminal Procedure be taken against the respondent in the trial Court. At the time of releasing the respondent - accused on bail, the trial Court shall add condition of accused marking presence in the trial Court every three months, till disposal of the Criminal Appeal. Trial Court shall yearly send report in January of marking presence by accused in this regard to this Court till disposal of appeal.
12. The respondent - accused shall appear before the trial Court for compliance of above directions on 16th May 2016.

(A.I.S. CHEEMA, J.)