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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 699 OF 2000

Kishor L. Purohit
carrying on his business at
25A-27, Super Bazar, Station Road,
Santacruz (West), Mumbai-400 054. ...Appellant/Orig.Complainant
Vs.

1. Prem Saxena
Residing at 52A – 6/1, Jeevan Aradhana,
LIC Colony, Borivali (West), Mumbai-400 103.

2. The State of Maharashtra ...Respondents

None for the Appellant
Mrs. Manisha Tidke, APP for the State, Respondent No.2

**CORAM : MR. S.B. SHUKRE, J.
DATED : 14TH MARCH, 2016**

JUDGMENT:

1. This is an appeal preferred against the judgment and order dated 4th September, 1998 passed in Criminal Case No. 289/S/1995 by the Metropolitan Magistrate, 44th Court, Andheri, Mumbai thereby acquitting the accused / respondent No.1 of the offence punishable under Section 138 of the Negotiable Instrument Act. Briefly stated, facts of the case are as under:

The appellant, the original complainant running a shop under the name and style of M/s. Kalatmak, situated at Super Bazar, Station Road, Santacruz (W), Mumbai advanced a hand loan / friendly loan of Rs.3,40,000/- to the respondent No.1, to enable the respondent to finance one company M/s. Kaveri Pharmaceuticals Ltd., that the accused was intending to promote. As a part of the repayment of the said friendly loan, the accused issued a cheque dated 10th October, 1995 bearing No.380241 for Rs.71,000/-, being the first installment of the schedule of repayment to the complainant. This cheque was due on 20th October, 1985 and it was deposited for collection of the amount thereunder by the complainant with the United Bank of India, Versova Branch, Mumbai on 9th November, 1995. However, the cheque was dishonoured on 13th November, 1995 for the reason "funds insufficient". In spite of receiving a notice of return of dishonour of cheque and a demand made by the complainant from the accused to pay the amount of the cheque, the accused / respondent No.1 failed / neglected to meet the said demand. Therefore, a complaint case for an offence

punishable under Section 138 of Negotiable Instrument Act was filed by the complainant against the accused.

After recording of the verification statement a charge for an offence punishable under Section 138 of Negotiable Instrument Act was framed to which the respondent No.1 pleaded not guilty and claimed to be tried. On merits of the case, the learned Metropolitan Magistrate found that the appellant failed to prove the case against the respondent for an offence punishable under Section 138 of Negotiable Instrument Act and therefore, by the judgment and order dated 4th September, 1998 acquitted the respondent of the same. Not being satisfied with the same, the complainant ie., the appellant is before this Court through this appeal.

2. This appeal is pending for final disposal for long period of time. Record shows that the appellant has been absent on several occasions in the past. Section 386 of the Code of Criminal Procedure requires hearing to be given to the appellant in an appeal as the present one only when the appellant is

present before the Court. The appellant has chosen to remain absent before the Court. Therefore, the provision of Section 386 of the Code of Criminal Procedure would require this Court to proceed in this appeal in accordance with law, which this Court is now doing.

3. If the appellant is absent before this Court, even the respondent is not present. However, I have gone through the record of the case including the impugned judgment and order. I find that the view taken by the learned Magistrate in this case is possible and cannot be said to be arbitrary or perverse. The learned Magistrate has found that there are circumstances available on record which reasonably indicate that a businessman like the appellant would not advance a friendly loan of Rs.3,40,000/- to a stranger like the respondent and that too without there being any receipt obtained from the respondent acknowledging the receipt of a friendly loan of Rs.3,40,000/- by him. The learned Magistrate has found that the evidence of the complainant that although the accused ie., respondent No.1 had issued a receipt to him, the original receipt

was handed over back by him to the respondent, is not inspiring any confidence. The learned Magistrate has observed that such version of the complainant or the appellant is hard to be believed as nobody would return such a conclusive and direct proof on mere acceptance of confirmation letter which is also not drafted happily. In these circumstances, I do not find any perversity or arbitrariness in the learned Magistrate drawing a conclusion that the basic requirement of the offence punishable under Section 138 of the Negotiable Instrument Act that the cheque must be issued in discharge of a legally enforceable liability has not been proved beyond reasonable doubt. No doubt, there is a presumption that a cheque is issued in discharge of such a legally enforceable liability / debt, the facts and circumstances appearing in the evidence of the prosecution in this case go to show that the defence taken by the respondent that the cheque was for some other transaction is probable and therefore, one must say, the presumption has stood rebutted. I am, therefore, of the opinion that no interference in the impugned judgment and order is warranted and the appeal deserves to be dismissed.

4. The Appeal is dismissed.

(S.B. SHUKRE, J.)