

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

5 CRIMINAL APPLICATION NO.1677 OF 2017

ABHAY S/O. TUKARAM MANE

.. Applicant

VERSUS

KASIM ABDUL S/O. REHAMAN SHAIKH

.. Respondent

...

Advocate for Applicant

: Shri V.D. Gunale

Advocate for Respondent

: Shri S.K. Mathpati

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CORAM : P.R. BORA, J.

DATE : October 10, 2017

PER COURT :

1. Heard the learned Counsel for the respective parties.

2. The applicant had filed a complaint under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act') against the respondent. It was the contention of the applicant that, he has given an amount of Rs.2,60,000/- to the respondent by way of hand loan and against the said amount, the cheque for the said amount was issued by the respondent in his favour. Since the said cheque dishonoured for insufficient funds in the account of respondent, the applicant filed the complaint under Section 138 of

the N.I. Act against the respondent. The trial Court has dismissed the complaint filed by the applicant on the ground that, the applicant - complainant failed to prove that, the cheque in question was issued towards legally enforceable debt. It is also observed by the trial Court that, the applicant has failed to prove the transaction by bringing on record any entry in his account books as about the said transaction or income tax return or any other document. The learned Counsel for the applicant submitted that, the learned trial Court has not appreciated that, presumption raised in favour of the applicant was not rebutted by bringing on record any cogent evidence and as such the complaint has been dismissed on some erroneous grounds.

3. The learned Counsel for the respondent has supported the impugned Judgment. The learned Counsel submitted that, the trial Court has rightly held that, the complainant did not prove the transaction, and has failed in proving that, the cheque in question was issued towards any legally enforceable debt. The learned Counsel, therefore, prayed for rejecting the application.

4. After having considered the submissions made by the learned Counsel appearing for the respective parties and on perusal

of the impugned Judgment, it *prima facie* appears to me that, the trial Court has not properly appreciated the evidence on record. Merely because the transactions are not recorded in the accounts books or elsewhere, no such conclusion can be drawn that there was no such transaction. The presumption raised in favour of the drawer of the cheque has to be rebutted by some strong evidence by the person, who has issued the said cheque. It appears that, the entire evidence needs to be rescrutinized and I am, therefore, inclined to allow the application. Hence the following order.

ORDER

- i) The application is allowed.
- ii) The appeal be registered in accordance with law.
- iii) On registration of the appeal, issue notice to respondent.
Learned Counsel Shri S.K. Mathpati waives service of notice for respondent.
- iv) Call for Record & Proceedings.
- v) List the matter for further consideration after six weeks.

(PR. BORA, J.)