

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

4 CRIMINAL APPLICATION NO. 2499 OF 2016

Shivaji s/o. Bhagwantrao Kute .. Applicant.

Versus

Jalindar s/o. Sukhdeo Kadam .. Respondent.

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Advocate for Applicant : Mr. M.P. Tripathi.

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CORAM : K.K. SONAWANE, J.

RESERVED ON : 12TH JUNE, 2017.

PRONOUNCED ON : 11TH AUGUST, 2017

Order :-

1. Heard the learned counsel Shri. Tripathi for the applicant.
Perused the application and relevant documents.
2. The applicant-complainant has preferred the present application seeking leave under Section 378(4) of the Code of Criminal Procedure, 1973 (Hereinafter, referred to as 'Cr.P.C', for short) to present an appeal against the impugned Judgment and order of acquittal of the respondent-accused, recorded by the learned Judicial Magistrate, First Class, Beed in Summary Criminal Case No. 956 of 2012 for the offence punishable under section 138 of the Negotiable Instruments Act.
3. It has been alleged that, the applicant indulged in the business of selling animal fodder at Mondha Area, Beed. The respondent was running Co-operative Dairy under the name and style as "*New Samarth Sahkari Doodh Sanstha*". The respondent

always used to purchase animal fodder from the shop of the complainant. It has further alleged that, the respondent did not repay the amount of Rs.2,00,000/- (Rs. Two Lac Only) towards purchase of goods from the shop of the complainant. Meanwhile, due to the recovery proceedings from the bank against the applicant, his shop was sealed. Therefore, he could not pursue for recovery of amount from the respondent. However, in the month of June-2011, the complainant restarted the business after opening his shop. He again insisted the complainant to repay the price of goods worth of Rs.2,00,000/- (Rs. Two Lac Only). Eventually, the complainant issued the cheque of Rs.2,00,000/- (Rs. Two Lac Only) in favour of complainant. But, the impugned cheque was dishonoured for lack of sufficient amount in the account of applicant-accused. The complainant issued legal notice, but he did not receive any response from the accused. At last, the complainant initiated penal proceedings under Section 138 of Negotiable Instruments Act against the respondent-accused.

4. The learned Judicial Magistrate, First Class, Beed issued the process against the respondent for trial. The applicant stepped into the witness-box and adduced his evidence. He has produced some relevant documents in support of his claim. The learned trial Court after considering entire evidence on record acquitted the accused for the charges under section 138 of Negotiable

Instruments Act. Being dissatisfied with the findings of the learned trial Court, the applicant is intending to prefer an appeal to redress his grievances. Therefore, the applicant, by invoking the remedy under Section 378(4) of the Cr.P.C., seeks the leave to present an appeal.

5. The learned counsel for the applicant vehemently submitted that, the impugned findings of the acquittal recorded by the learned trial Court is illegal, erroneous and not within the purview of Law. The learned trial Court did not appreciate the circumstances on record in its proper perspective. The complainant produced relevant document comprising the impugned cheque as well as bank documents for dishonour of the cheque etc. The learned trial Court failed to appreciate presumption under Section 118 read with Section 139 of the Negotiable Instruments Act, pertains to the holder of cheque and erroneously arrived at the conclusion that the impugned cheque was not issued by the applicant-accused to discharge his legal monetary liability. The learned counsel criticized the findings of the learned trial Court and submits that there are, *prima facie*, circumstances on record to favour the applicant. He has an every hope of success in appeal. Therefore, he requested to grant leave.

6. I have gone through the findings recorded by the learned trial Court. The intense scrutiny of the attending circumstances on record reflects that, the findings of the learned trial Court are just, proper and reasonable one. Admittedly, the complainant presented the cheque issued by the respondent-accused in the bank for encashment. But, same was dishonoured for lack of sufficient funds. Thereafter, complainant issued legal notice to the respondent, but, he did not receive any response from the accused. Hence, he filed present complaint. The applicant given much more emphasis on the circumstances of presumption under Section 118 read with Section 119 of the Negotiable Instruments Act, in his favour. According to applicant, he is the holder of the cheque issued by the respondent-accused, and therefore, in view of presumption, unless contrary is proved, the inference can be drawn that it was issued to discharge the legal liability.

7. No doubt, the purpose and object of issuance of impugned cheque must be for discharging monetary liability, and in case, the basic ingredients of legal monetary liability are lacking in the matter, the respondent-accused cannot be held guilty for the charges of dishonour of cheque. It is true that, there is provision under Section 118 read with Section 139 to draw the presumption in certain circumstances in favour of holder of cheque, but, the presumption is rebuttable one, and in case, the respondent-accused rebutted the presumption by adducing

cogent and succinct evidence, he cannot be held liable for the offence punishable under Section 138 of the Negotiable Instruments Act.

8. In the instant case, the respondent-accused adduced his evidence on record. He categorically come forward with specific defence that he had availed the hand-loan facility on interest from the complainant-applicant. He had also issued the blank cheque as well as mortgaged his land in favour of the applicant-complainant by way of security for refund of hand loan amount. Thereafter, he repaid the entire principle as well as interest amount of hand-loan to the complainant-applicant. The accused also demanded his blank cheque given in the custody of the complainant and to redeemed the mortgage of his land. According to respondent-accused, the complainant executed sale-deed in lieu of redemption of mortgage of his property after refund of hand-loan amount. But, the complainant-applicant did not return the blank cheque. The respondent-accused produced the document of sale-deed (Exhibit-73) on record. He has also examined one Harishchand in his favour as a defence witness. The learned trial Court has appreciated the document of the alleged sale-deed. It was transpired that, the alleged transaction was taken place in the year 2007 and the agricultural land was shown purchased by the applicant from the accused. Thereafter, the land came to be re-transferred in favour of accused by

executing document of sale deed (Exhibit-73) on the part of complainant. These circumstances fortify the defence propounded on behalf of accused in this case. The learned trial Court found reluctant to nod in favour of complainant on this legal aspect of issuance of cheque by respondent-accused for discharge of his legal monetary liability towards hand-loan of Rs.2,00,000/- availed by the accused from complainant.

9. After analysis of the entire attending circumstances on record, I do not come across with any error or imperfection in the findings of acquittal recorded by the learned trial Court. There is no any propriety to grant leave to present an appeal against impugned Judgment and order of acquittal of the respondent recorded by learned trial Court. There are least chances of success in the appeal and possibility of ultimate conviction is also bleak. In case, leave is granted, it would be futile efforts and dissipate the precise time of this Court. I am not inclined to nod in favour of the applicant-complainant to accord leave as contemplated under Section 378 (4) of the Cr.P.C.

10. In view of the aforesaid discussion, I do not find it just and proper to issue notice to the respondent for his appearance for hearing of the application seeking leave to present an appeal. Hence, in view of the circumstances mentioned above, the application deserves to be rejected.

11. In the result, application stands dismissed and disposed of accordingly in above terms. No order as to the costs.

[K. K. SONAWANE]
JUDGE

rrd.