

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

CRIMINAL APPLICATION NO. 3135 OF 2016

Ashok Mandan Prakashkar

...APPLICANT
(Ori. Complainant)

versus

Ghanshyam Narayan Sonwane

...RESPONDENT
(Ori. Accused)

.....
Mr. N.B. Surywanshi, Advocate for applicant
Mr. S.B. Rajebhosale, Advocate for Respondent
.....

CORAM : K.K. SONAWANE, J.

DATED : 12th JULY, 2017.

Order :-

1. The applicant-complainant is intending to present an appeal against the impugned judgment and order of acquittal of respondent-accused dated 02-04-2016 passed in STC No. 471 of 2011 by learned Judicial Magistrate, First Class, Nandurbar for the offence punishable under section 138 of the Negotiable Instruments Act, *inter-alia*, applicant seeks leave under section 378(4) of the Criminal Procedure Code(for short "Cr.P.C.") to present appeal against the impugned judgment and order of acquittal.

2. It has been alleged that the complainant purchased the immovable property i.e. plot admeasuring 139.10 Sq. Meters from Gut No. 346/A situated at Nandurbar from the accused for consideration of Rs. 2,16,000/-. Due to said transaction, their relations became cordial. In the month of September, 2010,

accused was in need of financial assistance. The complainant by availing loan facility on his Insurance Policy etc. raised the funds of Rs. 2,18,000/- and paid it to the accused as an hand-loan to cope with his financial need. Accordingly, the complainant paid the amount by issuing bearer cheque in favour of accused. The bearer cheque of complainant was encashed by the accused after putting his signature on the back side of the bearer cheque. It has been alleged that, accused in lieu of security for refund of hand loan amount issued post-dated cheque in favour of complainant drawn on the Dhule-Nandurbar District Central Co-operative Bank. Thereafter, the complainant presented the impugned post-dated cheque for encashment. But, it was returned back by the bank authority with remarks "funds insufficient" in the account of the accused. The complainant persuade the accused for refund of hand-loan amount, but found unavailing. Eventually, complainant issued legal notice through Advocate, but he did not receive any response. There were attempt to settle the dispute amicably, but yield no results. At last, complainant instituted the private complaint under section 138 of Negotiable Instruments Act, for penal action against the accused.

3. The learned Trial Court appreciated the oral and circumstantial evidence adduced on record on behalf of complainant as well as respondent-accused and arrived at the conclusion that the complainant failed to prove that the impugned cheque was issued

for discharging the legally enforceable debt. The learned Trial Court found reluctant to raise the presumption under section 118 read with section 139 of the N.I. Act in favour of complainant and proceed to pass the impugned judgment and order of acquittal of respondent-accused in this case.

4. Being dissatisfied with the impugned findings of the learned trial Court, the complainant is intending to prefer an appeal by availing remedy under section 378 of the Cr.P.C. and therefore, complainant prayed to grant leave as contemplated under section 378(4) of the Cr.P.C. to present the appeal to redress his grievance.

5. I have heard learned counsel for both the parties at length. I have also perused the findings expressed by the learned trial Court as well as relevant documents on record. It is not put in controversy that the complainant has purchased the immovable property i.e. plot from the accused and since then their relations were cordial. It is an admitted fact that the complainant raised funds by availing loan facility on his insurance policy etc. worth Rs.2,18,000/- to cope with the financial need of the accused-respondent. There are circumstances on record sufficient to point out that the complainant had issued bearer cheque in favour of accused amounting to Rs.2,18,000/- which was presented by the accused with the bank for its encashment. The accused also received amount of Rs. 2,18,000/- from the bank on encashment of bearer cheque issued by the complainant. It has been alleged on behalf of

complainant that the accused issued impugned post-dated cheque in favour of complainant for refund of the hand loan of Rs.2,18,000/-. The complainant tendered the cheque for encashment, but it was dishonoured. Therefore, the complainant filed complaint under section 138 of Negotiable Instruments Act against the accused.

6. According to respondent-accused, there was transaction of immovable property in between himself and complainant and in lieu of security, accused issued the impugned cheque in favour of complainant. Accused denied about any such hand loan transaction and issuance of impugned cheque for refund of hand-loan amount. The complainant produced the documents in regard to payment of Rs.2,18,000/- to the accused through bearer cheque having signature of accused on it. The complainant also produced bank record showing the dishonour of cheque issued on the part of accused in favour of complainant. These circumstances *prima facie* indicate about the occurrence of alleged transaction. The argument for raising the presumption under section 118 read with section 139 of the Negotiable Instruments Act in favour of the complainant also found sustainable. The disputed question which is to be determined in this proceeding is, "whether the impugned cheque issued by accused in favour of complainant was in lieu of security for the transaction of immovable property or for refund of monetary liability incurred by the accused after availing hand-loan facility from the complainant ?" This crucial issue is essential to be dealt with on the

anvil of merit in detail at the time of hearing of the appeal. *Prima facie*, it appears that there are issues arguable in nature and requires deep enquiry. Therefore, leave to present the appeal is imperative for substantial justice. In case, leave is not granted, it would cause prejudice and injustice to the complainant. The circumstances on record demonstrate that reasonable opportunity is essential to be given to the complainant to ventilate his grievance in the appellate forum for redressal. Hence, I do not find any impediment to grant leave to present appeal. Therefore, application seeking leave under section 378(4) of the Cr.P.C. to present the appeal against the impugned judgment and order of acquittal of respondent-accused is hereby granted. Application is allowed. Registry to take requisite steps for further process.

7. After compliance of all procedural formalities, list the matter for hearing on merits in due course.

8. The Criminal application stands disposed of accordingly.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK