

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

CRIMINAL APPLICATION NO. 3265 OF 2016

Vinod S/o Uttam Jain,
Age: 38 years, Occu: Business,
R/o: Taloda Road, Nandurbar,
Dist: Nandurbar.

...APPLICANT

versus

Krushna S/o Onkar Patil,
Age: 52 yrs. Occu. Agril.,
R/o: Near Shani Mandir, Taloda,
Tq. Taloda, Dist. Nandurbar.

...RESPONDENT

.....
Mr. Amit A. Mukhedkar, Advocate for applicant
Mr. A.S. Sawant, Advocate for respondent – sole

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CORAM : K.K. SONAWANE, J.

DATED : 29th JUNE, 2017.

Order :-

1. Heard the learned advocates appearing for parties at length.
2. The application seeking leave under section 378 (4) of the Criminal Procedure Code (for short "Cr.P.C.") to present the appeal against impugned judgment and order of acquittal of respondent-accused passed by the learned trial Court, in complaint case bearing STC No. 1011 of 2007 is the subject-matter for consideration of this Court. According to applicant, his relation with respondent was cordial since long. On 06-07-2007 the applicant provided financial assistance of Rs. 1,65,000/- to respondent as hand-loan for his private work. It was agreed that amount would be refunded within a month to the applicant-complainant, but respondent-accused failed to discharge his legal liability. Despite repeated demand, respondent - accused did not repay the amount. Eventually, he

issued cheque dated 06-08-2007 for refund of hand-loan to the applicant-complainant. Unfortunately, cheque was dishonoured for lack of sufficient balance in the account of respondent-accused. The applicant has issued legal notice for payment of the amount of cheque, but he did not receive any amount from respondent-accused and at last complainant approached to the Court of law and preferred the complaint bearing STC No. 1011 of 2007 for penal action under section 138 of the Negotiable Instruments Act.

3. The applicant-complainant examined himself on oath and produced the document of cheque issued by respondent-accused in his favour. He had also submitted bank documents pertaining to dishonour of impugned cheque as well as legal notice issued to the respondent-accused for discharging his legal liability. The respondent-accused denied the allegations and contended that, he had not issued any cheque in favour of complainant. But, he has misused the cheque, which was given by respondent - accused to his friend Mr. Yogesh Chaudhari in lieu of security for loan given to his nephew Mr. Jitendra Patil.

4. The learned trial Court appreciated oral, documentary and circumstantial evidence adduced on record and arrived at the conclusion that complainant failed to prove the requisite ingredients of section 138 of the Negotiable Instruments Act. There was no cogent and dependable evidence on record to show that respondent-accused delivered the impugned cheque in favour of applicant-complainant for discharging his legal liability. In the result, learned trial Court passed the impugned judgment and order of acquittal of the respondent-accused.

5. Being dissatisfied with the impugned findings recorded by the learned trial Court, the applicant-complainant is intending to prefer an

appeal under section 378 of the Cr.P.C. to redress his grievance *inter-alia*, he prays to accord leave as contemplated under section 378 (4) of the Cr.P.C. to present an appeal against impugned judgment and order of acquittal of respondent-accused passed by the learned trial Court.

6. The learned counsel for the applicant vehemently submitted that impugned findings recorded by the learned trial court are erroneous, illegal and not within the ambit of law. The learned trial Court failed to appreciate oral and circumstantial evidence on record in its proper perspective. The findings recorded by the learned trial Court are totally based on surmises and conjectures. According to learned counsel, the applicant-complainant has proved the circumstances against the respondent-accused to raise the presumption under section 118 of the Negotiable Instruments Act. But, the learned trial Court did not appreciate the circumstances in proper manner and committed error. There is no whisper in the findings expressed by the learned trial Court for not raising the presumption under section 118 of Negotiable Instruments Act. The learned counsel submits that there are circumstances on record *prima facie* to show that respondent - accused delivered the cheque in favour of the complainant for discharging legal / monetary liability. The applicant has every hope of success in the appeal. In case, leave is refused, it would cause prejudice and injustice to the applicant. Hence, he prays to accord leave to present appeal against the impugned findings of acquittal of respondent-accused.

7. In refutation, learned counsel for respondent - accused vociferously opposed the contention put forth on behalf of respondent. The learned trial Court has correctly appreciated the circumstances on record and passed the impugned judgment and order of acquittal in favour of respondent-

accused. The entire evidence of applicant - complainant is doubtful. There are no circumstances on record sufficient to draw adverse inference against respondent-accused. The learned counsel pointed out the discrepancies in the evidence of complainant in detail and submits that complainant was not familiar with accused nor impugned cheque was given to the complainant for discharging legal/monetary liability. The complainant failed to prove the circumstances essential to raise presumption under section 118 of the Negotiable Instruments Act. The star witness Mr.Yogesh Chaudhary, who was mediator for the friendship of complainant and accused, did not come forward for evidence before the learned trial Court. According to learned counsel, there is no propriety to accord leave in favour of applicant-complainant and it would be futile efforts. Therefore, he prays not to nod in favour of applicant.

8. I have given anxious consideration to the rival submissions canvassed on behalf of both sides. I have also gone through the findings expressed by the learned trial Court as well as relevant documents produced on record including record and proceedings of the present case. Admittedly, there was a cheque bearing signature of respondent-accused filed on record on behalf of applicant-complainant. It was alleged that respondent-accused delivered the impugned cheque for discharging his monetary liability of hand-loan given by applicant-complainant on 06-07-2007. There are documents of bank showing dishonour of impugned cheque. The complainant has also issued legal notice prescribed under section 138 of the Negotiable Instruments Act. But, respondent/accused did not give any response. Eventually, the complainant knocked the door of the Court of Judicial Magistrate, First Class and filed the complaint, for penal action under section 138 of Negotiable Instrument Act, which came

to be resulted into acquittal of the respondent - accused.

9. The intense scrutiny of the factual score and documents produced on record, *prima facie*, reflects that there are arguable points for consideration to adjudicate the dispute on merit. No doubt, that the impugned cheque was produce on record from the custody of complaint and it bears signature of respondent-accused. It is to be noted that respondent-accused specifically came forward with defence that he had given impugned cheque to his friend Mr. Yogesh Choudhary in lieu of security for the loan amount given to his nephew. The respondent-accused denied that the impugned cheque was issued by him in favour of complainant for repayment of hand-loan. Obviously, this issue is required to be considered on the anvil of merit. The scope of enquiry in the application seeking leave under section 378 (4) of the Cr.P.C. and the powers of appellate Court while re-appraisal of evidence in the appeal are totally distinct and based on different footings. The arguable issue in this matter is essential to be dealt with in detail by re-appreciation of evidence adduced on record before the trial court. Therefore, I am of the opinion that *prima-facie* there are circumstances on record to grant leave to present the appeal against the impugned findings of acquittal of respondent-accused in the proceedings bearing STC No. 1011 of 2007. In case the leave is not granted it would cause injustice & prejudice to the applicant-original complainant.

10. In the light of above, the application seeking leave to present the appeal against the acquittal of respondent-accused under judgment and order dated 07-04-2016 in the proceedings bearing STC No. 1011 of 2007 passed by the learned Judicial Magistrate, First Class, Nandurbar stands

allowed. Accordingly, leave is granted. The Registry to take necessary steps for further process.

11. After registration of appeal, issue notice to respondent-accused. Mr. Sawant, learned counsel waives service of notice on behalf of respondent-accused.

12. Considering the nature of subject-matter, printing of paper-book stands dispensed with.

13. List the appeal for final hearing after completion of procedural formalities.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK