

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO.431/2014

IN

CRIMINAL APPEAL NO.259/2017

Smt. Rajkuwar W/o Santosh Gandhi

..Vs..

Vishal S/o Ganesh Wagh

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A.HAQ, J.

DATE : 7.6.2017.

None appeared for the applicant when the matter is called out. Heard Shri N.R. Tekade, Advocate for the non-applicant.

By this application the applicant seeks leave to file appeal to challenge the judgment passed by the learned Magistrate by which complaint filed by the applicant under Section 138 of the Negotiable Instruments Act, 1881 is dismissed and the non-applicant is acquitted. Considering the facts of the case *prima facie*, the applicant is granted leave to file appeal. Criminal application is **allowed** accordingly.

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As the matter is pending since 2014, the appeal is taken up for hearing.

Heard Shri N.R. Tekade, Advocate for the respondent. The facts of the case show that it is

undisputed that the respondent had given cheque for the value of Rs.1,10,000/- dated 30th May, 2011 to the appellant. According to the appellant the cheque was given to repay the amount which was taken by the respondent from the appellant towards hand loan. According to the appellant the relationship between the appellant and the respondent had been cordial.

There is no dispute that on presentation of the cheque in question it was not honoured as sufficient funds were not in deposit of the account of the respondent. It is undisputed that the appellant had issued notice which was received by the respondent within specified time and inspite of notice the respondent had not repaid the amount. It is undisputed that the respondent had not given reply to the notice.

After conducting the trial, the learned Magistrate recorded that the complainant has failed to prove that the cheque was given by the accused to the complainant to discharge legally enforceable liability. The learned Magistrate has committed patent error by recording the above conclusions, overlooking the provisions of Section 118 and 139 of the Negotiable Instruments Act which create a statutory presumption that the cheque issued by a person is for discharge of legally enforceable debt or liability unless the person who has issued the cheque proves that the cheque was not given to discharge legally enforceable liability. The respondent, who issued the cheque, should have pleaded and proved that the cheque was not given to discharge

the legally enforceable liability. The learned Advocate for the respondent has not been able to point out any evidence led by the respondent to discharge the burden of proving that the cheque was not issued to repay legally enforceable debt. In view of the above, I find that the impugned judgment is unsustainable.

Hence, the following order:

- (i) The impugned judgment is set aside.
- (ii) It is held that the respondent is guilty of offence punishable under Section 138 of the Negotiable Instruments Act, 1881.
- (iii) The respondent is directed to pay fine of Rs.2,20,000/- (Rs. Two Lakhs Twenty Thousand). The amount of fine shall be paid till 5th July, 2017.
- (iv) On deposit of amount of fine, Rs.2,10,000/- (Rs. Two Lakhs Ten Thousand) be given to the appellant / complainant.
- (v) In default of payment of fine within stipulated time, the respondent shall undergo simple imprisonment for two years.
- (vi) The respondent shall pay costs of Rs.10,000/- (Rs. Ten Thousand) to the appellant till 5th July, 2017.
- (vii) The appeal is **allowed** in the above terms.

JUDGE