

(1)

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

CRIMINAL APPLICATION (APPA) NO.739 OF 2015

Mr Haribhau s/o Vishwanath Divnale,
Age 50 years, Occupation – Agriculturist,
R/o Raundala, Taluka Akot, Dist. Akola ..APPLICANT

VERSUS

Mr Shamlal s/o Ashokrao Ardak,
Age Adult, Occupation : Business,
R/o Sham Nagar, Galli No.2,
Amravati ..RESPONDENT

Mr Rajnish R. Vyas, Advocate for applicant;
Mr S.J. Kadu, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 21st March, 2017

ORAL ORDER

By this application under Section 378 (4) of the Code of Criminal Procedure, the applicant – original complainant seeks leave to file appeal for challenging the judgment and order dated 24th September, 2015, passed by Judicial Magistrate First Class, Telhara, thereby acquitting the respondent – accused of an offence punishable under Section 138 of the Negotiable Instruments Act.

2. Mr Vyas, learned Counsel appearing on behalf of the applicant would urge that the learned Magistrate ignored presumption under Sections 118 and 139 of the Negotiable Instruments Act, as issuance of the cheque in question is not in dispute. According to him, the capacity of the complainant to part with an amount of Rs.8,00,000/- should have been considered after the accused rebutted the presumption against him.

(2)

3. Considered the submissions in the backdrop of the observations made by the learned Magistrate while acquitting the accused. In view of the scheme of an offence punishable under Section 138 of the Negotiable Instruments Act, it has to be noted that the issue of legally enforceable debt has to be established by the complainant first in the complaint, then only a rebuttal of presumption passes on the accused. In the present case, the applicant – complainant claims to be an agriculturist, having holding of 7 Hectares and has parted an amount of Rs.8,00,000/-. There is no documentary evidence to infer the handing over of such loan amount to the accused, as neither any bank entries nor any other such documents, so as to infer loan transaction are produced on record. The accused has come out with a defence that two blank cheques issued by him to Jyoti Rajas as security were misused by the complainant. Even if it is assumed that the said cheques were issued by the accused, the same cannot be stretched to the extent of inferring the transaction between the complainant and the accused, which speaks of issuance of the cheques.

4. In view thereof, in my opinion, the order of acquittal recorded by the learned Magistrate does not warrant any interference. As such, leave refused. Criminal Application stands rejected.

(N.W. SAMBRE, J.)

amj