

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

CRIMINAL APPLICATION (APPA) NO.337/2018
&
CRIMINAL APPEAL NO.595/2018

The Lokhit Urban Co-op. Credit Society Ltd.,
 through its Officer Muniroddin Muzaffarddin,
 age 52 years, Occu. Service, R/o Hanuman Basti,
 Near Subhash Chowk, Akola.

..Appellant.

..Vs..

Nazimuddin S/o Sk. Lukman,
 age adult, Occu. Business,
 R/o Zira Bawdy, Khadan, Akola,
 Tq. and Distt. Akola, P.S. Khadan,
 Akola.

.Respondent.

 Shri S.G. Joshi, Advocate for the applicant / appellant.

CORAM : Z.A. HAQ, J.

DATE : 3.10.2018.

1. On 3rd September, 2018 none appeared for the non-applicant / respondent, though served. This Court passed an order directing that record and proceedings be called and adjourned the hearing of application for 3rd October, 2018 i.e. today. The learned Advocate for the applicant / appellant was directed to send copy of order dated 3rd September, 2018 to the non-applicant / respondent by speed post acknowledgment due and file affidavit of compliance. The learned Advocate for the non-applicant / respondent has filed affidavit sworn on 7th September, 2018 pointing out that

copy of order dated 3rd September, 2018 is sent to the non-applicant / respondent by speed post acknowledgment due. The postal receipt is also filed on record to support the statement.

2. The applicant has filed appeal to challenge the judgment passed by the learned Magistrate by which the complaint filed by it under Section 138 of the Negotiable Instruments Act, 1881 (for short “the Act of 1881”) is dismissed and the non-applicant / accused is acquitted. The complaint is dismissed by the learned Magistrate recording that the complainant has failed to prove that the cheque in question was given by the accused to the complainant to discharge the legal liability.

3. Considering the facts of the case and after hearing the learned Advocate for the applicant, I am satisfied that the applicant has made out case for grant of leave to file appeal to challenge the above referred judgment. Hence leave granted.

ORAL JUDGMENT IN CRIMINAL APPEAL NO.595/2018

4. The appeal is taken up for hearing.

5. **ADMIT.**

6. Considering the facts of the case and as record and proceedings are received, appeal is taken up for hearing.

7. According to the appellant - a co-operative bank, the accused had taken loan from it. As the accused failed to repay certain amount which had become due, the appellant / complainant had demanded the amount from accused and the accused had issued cheque dated 6th December, 2005 for Rs.25,000/-. The cheque was presented, however, it was not honoured and it was returned to the complainant alongwith the memo with the endorsement "funds insufficient". The complainant issued notice dated 19th December, 2005 under certificate of posting calling upon the accused to pay the amount, however, the accused neither gave reply to the notice nor paid the amount. Hence the complainant filed complaint under Section 138 of the Act of 1881.

8. After assessing the evidence on record, the learned Magistrate has recorded that the complainant has proved that the cheque (Exh. No.68) was signed by the accused, that the cheque was returned by the bank vide memos (Exh. No.69 and Exh. No.70), the issuance of notice by the complainant to the accused is proved by the postal receipt (Exh. No.72) and postal certificate (Exh. No.73). The learned Magistrate has further recorded that the evidence on record substantiates the claim of the complainant that accused had taken loan from the complainant.

The learned Magistrate has dismissed the complaint recording that the complainant has not produced the relevant documents on record to prove that amount of Rs.25,000/- was payable by the accused to the complainant.

9. After considering the arguments of learned Advocate appearing for the appellant / complainant and examining the material on record, I find that the learned Magistrate has recorded erroneous findings, overlooking the statutory presumption created by Section 139 of the Act of 1881. The complainant has brought sufficient evidence on record and has proved that the accused had taken loan from it. The accused has not denied his signature on the cheque (Exh. No.68). The complainant has discharged the preliminary burden of proving that the cheque (Exh. No.68) was given by the accused to the complainant to discharged legally enforceable liability. If the facts are examined in the light of the provisions of Section 139 of the Act of 1881, I find that the accused has not been able to rebut the statutory presumption. The learned Magistrate has committed an error by dismissing the complaint, recording that the complainant has not produced relevant documents to prove that amount of Rs.25,000/- was payable by the accused to the complainant. The learned Advocate for the appellant has pointed out that in fact, this was not the case of the accused also, before the trial Court.

In view of the above facts, I find that the impugned judgment is unsustainable and has to be set aside.

10. Hence, the following order:

(i) The impugned judgment is set aside.

(ii) It is held that the respondent / accused - Nazimuddin S/o Sk. Lukman is guilty of commission of offence under Section 138 of the Negotiable Instruments Act, 1881.

(iii) The respondent / accused shall deposit an amount of Rs.50,000/- within three months.

(iv) If the amount is deposited within three months, Rs.45,000/- be given to the appellant / complainant.

(v) If the amount is not deposited within stipulated time, the respondent / accused - Nazimuddin S/o Sk. Lukman shall undergo imprisonment for one year.

(vi) Appeal is **allowed** in the above terms with costs quantified at Rs.20,000/- to be paid by the respondent / accused to the appellant.

(vii) The respondent / accused shall file receipt of payment of costs before the learned Magistrate within three months.

JUDGE