IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 113 OF 2017

Mr. Ashwani K. Tangri. ..Applicant.
V/s.
Naresh Kumar Sharma & anr. ..Respondents.
Mr. Dormaan Jamshid Dalal, advocate for applicant.
Mr. Shivprasad R. Pagare, advocate for respondent No. 1.
Mr. S.R. Agarkar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : MARCH 25, 2019.

P. C. :

1 Heard the learned Counsel for the applicant and the learned APP for State.

2 This is an application seeking leave to appeal challenging the Judgment and Order dated 21/1/2017 passed by the Joint Judicial Magistrate First Class, Cantonment Court, Pune in Summary Criminal Case No. 822/2012 thereby acquitting the respondent of the charges punishable for offence punishable under section 138 of the Negotiable Instruments Act.

3 The facts in nut shell are as follows :

(i) The applicant/complainant herein had presented a cheque purportedly signed by the present respondent to the tune of Rs. 15 lakhs towards the repayment of legally enforceable debt. The said cheque was dated 31/12/2011. The cheque was dishonoured on 3/1/2012.

(ii) On 23/1/2012 the applicant/complainant herein had issued a statutory notice to the respondent demanding repayment of Rs. 15 Lakhs. It was advanced to him by way of handloan for starting, developing and expanding school at Noida in the name of "Smiling Sunflower Nursery School".

(iii) The said demand notice was returned with remark/endorsement "the addressee is out of station and likely to come back after a period of 20 days." Needless to say that the respondent/accused herein had not received statutory notice as the applicant/complainant had not sent the notice once again to him after 20 days.

(iv) The applicant/complainant had then filed complaint against the respondent alleging an offence punishable under section 138 of the Negotiable Instruments Act on 31/7/2012. Process was issued against the respondent/accused.

4 The complainant had filed affidavit of evidence. It is pertinent to note that it was not stated in the complaint as to the date on

which handloan was demanded, the date on which it was disbursed or extended by the complainant. There was no documentary proof to show that an amount of Rs. 15 Lakhs was paid to the accused.

5 It is further pertinent to note that the present applicant/complainant happened to be a pensioner on the date of extending the handloan. The applicant/complainant was cross-examined and in the course of cross-examination, he has stated that the applicant/complainant had paid Rs. 9 Lakhs in cash from his personal savings and Rs. 3 Lakhs by borrowing money from his friend namely Sukhwinder Kalada and took Rs. 3 Lakhs from his family members. The complainant has not examined any family members or his friend Sukhwinder Kalada to show that the amount was demanded from him to fulfill needs of the accused person.

6 It was contended by the respondent/accused that he had not signed the said cheque. However, the said contention was not taken to its logical end and was not seriously challenged.

7 The complainant has examined Akshad Sharma as witness for the complainant. Akshad Sharma is the son of the respondent. According to him, he had accompanied his parents to the house of the

complainant when the amount was demanded and in his presence, money was handed over to his father. In the year 2015 when the deposition was recorded, Akshad was 23 years old. The loan was extended in the year 2009. Akshad has not stated as to how much money was given to his father. At the time of recording of evidence, Akshad was not residing with his father. The accused was living separately whereas his wife was residing with his son Akshad. It is admitted by Akshad that his father was having illicit relationship with another woman and he was in a habit of giving money to that lady by borrowing money from others.

8 The record would indicate that the respondent/accused in the present case has filed divorce petition against his wife before the District and Sessions Court, Dwarka, New Delhi. Name of the complainant is specifically mentioned in the divorce petition. The respondent/accused in answer to the question No. 27 under section 313 of the Code of Criminal Procedure, 1973 has specifically stated as follows:

> "There is litigation between myself and my wife for divorce. There is illicit relationship in between my wife and complainant. Therefore, to take revenge with the help of my wife, complainant lodged false complaint. Inspite of repeated request made by me, he used to come to my house. Complainant was in service at Delhi and residing separately

> from his family."

Further in answer to question No. 28 he has stated that-

> "My son is in influence of my wife. He used to take liquor. I prohibited him many times. Divorce case is pending against me and my wife. Therefore, to take revenge, he is deposing false."

9 The learned Magistrate has rightly appreciated that the applicant/complainant had no records to show that he was carrying a cash of Rs. 9 lakhs with him. There is no documentary proof. The applicant/complainant does not remember the date on which loan was demanded and was extended. The applicant/complainant has not mentioned about the said transaction in his income-tax return. The applicant/complainant has not examined his family members or his friend Sukhwinder Kalada to show that the amount was borrowed from them.

10 All this coupled with the fact that the accused had specifically contended that he is not the signatory of the said cheque, what is to be appreciated in the present case is that the accused had not received statutory notice prior to filing of the complaint. In fact, the endorsement was to the effect that the addressee was to return within 20 days. The complainant could have waited for 20 days and then issued a notice. In

the eventuality that it was a friendly loan, the complainant could have contacted the accused. All this needs to be appreciated in view of the strained relationship between the accused and his wife. The reason being that the accused has filed HMA No. 788 of 2011 in the Court of District and Principal Judge, Family Court at Dwarka. The said petition was registered on 9/11/2011 and the cheque was presented for encashment on 3/1/2012. According to the applicant/complainant, the cheque was issued on 28/11/2009.

11 In view of the above discussion, the application seeking leave to appeal deserves to be dismissed. Hence, the application to leave to appeal is dismissed.

[SMT. SADHANA S. JADHAV, J.]

Talwalkar