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Bharat
D. Pandit

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 481 OF 2019
(For leave to appeal)**

Amit Madhukar Ranjane

..... Applicant.

V/s

State of Maharashtra and Others

..... Respondents.

Mr. Vasant B. Ghorpade for the Applicant.

Mr. R.M. Pethe, APP for the State.

CORAM: NITIN W. SAMBRE, J.

DATE: NOVEMBER 21, 2019

P.C.:-

1] Heard the learned Counsel for the Applicant on the issue of grant of leave to file appeal.

2] The Judicial Magistrate, First Class vide judgment dated 17/3/2018 dismissed the complaint preferred by the Applicant for an offence punishable under Section 138 of the Negotiable Instruments Act, resulting into acquittal of the Respondent/Accused.

3] The acquittal is based on the finding recorded by the learned

Magistrate that the Applicant/Complainant has failed to comply with prerequisites as contemplated under Section 138 of the Negotiable Instruments Act and has also failed to prove that the cheque in question was issued by the Accused in discharge of legally enforceable liability. The learned Magistrate has observed that the Respondent/Accused has rebutted presumption as provided under Sections 118 and 139 of the Negotiable Instruments Act.

4] While assailing the judgment of acquittal, learned Counsel for the Applicant would invite attention of this Court to certain admitted facts viz. Respondent/Accused was out of country from 9/2/2016 to 3/8/2016. According to the learned Counsel, Accused was served with the notice. Since he was out of country, he should not be permitted to take undue advantage of the non-service of notice on his person, particularly in the circumstances which were self created by the Accused. According to him, it has to be presumed that the notice was duly served on the Accused and as such, the findings recorded by the learned Magistrate are perverse. His further submission is, once there is an agreement between the parties and the signature on the cheque is admitted, the onus on the accused is not discharged. He

would take me through the observations made by the learned Magistrate in the impugned judgment and also the record.

5] Perused the judgment impugned.

6] The learned Magistrate has framed points for determination for his consideration on the issue of mandatory compliance of prerequisites before initiation of the proceedings/prosecution under Section 138 of the Negotiable Instruments Act. The learned Magistrate, while ordering acquittal, has noticed that the very prerequisite i.e. issuance of statutory notice was not complied with. While recording such finding, the Magistrate has rightly taken note of the admission given by Complainant No.2 that it was within the knowledge of Complainant that the Accused was out of country (travelled to U.S.A.) for a period from 9/2/2016 to 3/8/2016, the period within which demand notices-Exhibit-26 and Exhibit-30 were claimed to have been issued. Though the demand notice – Exhibit-30 was claimed to have been served on the Accused, demand notice – Exhibit-26 was claimed to have been returned with the remark “not claimed”, which, according to the learned Counsel for the Applicant, is

sufficient compliance of service. He has drawn support from the provisions of Section 27 of the General Clauses Act. As far as presumption under General Clauses Act is concerned, same will not be of any assistance to the case of the Applicant/Complainant, particularly in the light of the admission given by Complainant No.2 that it was within the knowledge of Complainant that the Respondent/Accused was out of country from February to August, 2016.

7] As such, finding recorded that there is non-compliance of statutory requirement of issuance and service of notice on the Respondent/Accused is well founded. Apart from above, onus of proving that the cheque was not issued for legally enforceable liability appears to have been duly discharged by the Accused, particularly in the backdrop of admission and signature on the cheque in question. The Accused has admitted that he has taken an amount of Rs 4,88,000/- from the Complainant as could be inferred from his statement recorded under Section 313 of Cr.P.C. However, if the evidence of Complainant in the aforesaid background is appreciated, the Applicant/Complainant has failed to prove documents at Exhibit-18 and 19 i.e. alleged agreement entered into between the parties.

8] Fact remains that the view expressed by the learned Magistrate for acquitting the Accused is a possible view. As such, leave stands refused.

9] This will not preclude the Applicant from initiating civil proceedings for recovery.

(NITIN W. SAMBRE, J.)