

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

Criminal Application [APPA] No.746 of 2019

Arun s/o Dajiba Sakhare vs. Krushna Pandurang Somkuwar

 Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's Orders

*Shri P.P. Kotwal, Advocate for the Applicant/Appellant.
 Shri J.M. Shamkuwar, Advocate for the Respondent.*

CORAM : S.M. MODAK, J.
DATE : 6th DECEMBER, 2019.

The issue involved before me is whether the trial Magistrate has rightly observed that the complainant has not discharged its burden. For the limited purpose of deciding the issue, whether to grant the leave or not, this Court is supposed to go through the evidence.

With the assistance of both the sides, I have gone through the evidence. It consists of the evidence of the complainant and the Bank Officer. The accused has not entered into the witness box, but he has chosen to restrict himself in conducting the cross-examination. It is a settled principle of law that in a prosecution under Section 138 of the Negotiable Instruments Act, the Court has to begin with the presumption in favour of the holder of the cheque. The Court has to presume that cheque was issued for

discharge of liability. Such presumption can be drawn after proving of the introductory facts in this case, the respondent-accused has not disputed his signature.

The complainant contends that cheque was issued towards repayment of hand loan of Rs.90,000/-. Once the complainant has proved the introductory facts, the presumption comes to his assistance. Now the issue is, whether the learned Magistrate was right in holding that the complainant has not discharged the burden. There are two issues, one is not producing the documents supporting advancement of loan by the complainant and second is proving the defence taken by the accused. I think, the trial Magistrate has wrongly mixed up these issues. In an answer to Section 313 statement, the accused has taken a defence that due to acquaintance, the cheque was found missing from his office and after receipt of notice, he realized that the cheque was in his possession. Both the learned Advocates admit that this story was not put up during cross-examination and also while replying to the notice. It is true that the complainant cannot be relied upon the inconsistent defence taken during cross examination, but he has to stand on his own footings.

The learned Magistrate observed that in order to prove the advancement of the amount, the complainant has not adduced the documents. I think, there is a scope for conducting enquiry about this findings, particularly, when the accused has admitted the signature and, particularly, when there are certain lacunae in the defence. So, there is a need for this Court to re-appreciate the evidence and the findings. Hence, the complainant has made out a case for grant of leave. In the result, the following order is passed.

ORDER

- i. Leave to prefer an appeal against the judgment dated 06/05/2019, passed by 19th Joint Civil Judge Junior Division & J.M.F.C. (Special Court for N.I. Act), Nagpur is granted.
- ii. Criminal appeal be registered.
- iii. The application is allowed and disposed of accordingly.

Criminal Appeal No.810/2019 :

Heard.

Admit.

Shri J.M. Shamkuwar, learned Counsel waives notice for the respondent sole.

Call for record and proceedings.

The respondent-accused is directed to furnish bail before the learned Magistrate in order to show that he will appear in this Court as and when required.

The respondent-accused is directed to appear before the learned Magistrate on 9th of January, 2020.

The learned Magistrate is directed to accept the surety from the respondent-accused and furnish compliance report to this Court.

The respondent-accused is at liberty to request the trial Court for accepting the old surety on furnishing fresh P.R. Bond and Security Bond.

JUDGE

**sandesh*