

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

**APPLICATION FOR LEAVE TO APPEAL BY PRIVATE
PARTY NO.205 OF 2019**

Shri. Chaitanya Builders & Contractors,
Through its partners-

- 1) Harshal S/o Ramchandra Shinde,
Age-36 years, Occu:Business,
- 2) Lahu S/o Natha Kanade,
Age-61 years, Occu:Business,

R/o-In Front of Sagar Hotel,
Shriram Chowk, Pipeline Road,
Satedi, Ahmednagar.

...APPLICANT

VERSUS

Rahul S/o Prakash Mandhare,
Age-37 years, Occu:Business,
R/o-Behind Kalika Pride,
Laltaki, Dist-Ahmednagar.

...RESPONDENT

...
Ms. Pooja V. Langhe Advocate for Applicant.
Mr.S.R. Wakale, Advocate for Respondent.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 10th JUNE 2022

ORDER :

1. Present Application has been filed by original complainant

seeking leave to appeal to challenge the acquittal of respondent by learned Judicial Magistrate First Class, Court No.7, Ahmednagar, District-Ahmednagar in S.C.C. No.1479 of 2017 on 5th October 2019 for the offence punishable under Sections 138 of the Negotiable Instruments Act, 1881 (for short "N.I. Act").

2. Heard learned Advocate Ms. Langhe appearing for the applicant and learned Advocate Mr. Wakale appearing for respondent.

3. It is to be noted that the complainant is a registered partnership firm and even as per the impugned Judgment, it is undisputed that there was an agreement between the accused and the complainant in respect of construction i.e. development agreement in respect of construction to be made in C.S. No.7565. As per clause No.27 of the development agreement, the complainant had agreed to give Rs.13,33,333/- as deposit to accused and after development of the said property, the accused was to return the said amount to the complainant without interest. That amount was given by the complainant through cheque on 22nd October 2013. According to the complainant, possession was handed over on 18th October 2016 and receipt to that effect was executed. It was also registered before the Sub-

registrar office, Ahmednagar. There was delay in completion of the construction and after deduction of the fine amount, the accused was supposed to pay amount of Rs.7,88,333/-. For that purpose, accused issued cheque bearing No.675572 on 26th November 2016 drawn on Punjab National Bank, Dalmandai Branch, Ahmednagar. However, the said cheque was dishonoured with remark "payment stopped by drawer", on 14th February 2017. Statutory notice was issued to the accused on 22nd February 2017 by the complainant. Intimation of the said notice was given to the accused on 23rd February 2017 as well as on 24th February 2017 but that notice was not accepted and therefore, the complaint was filed. The complainant has led evidence, so also the accused has produced documents in evidence.

4. It appears that the defence of the accused was that the complainant was required to complete the construction till 26th November 2016 and it was agreed that if the complainant completes the construction till the said date, the post dated cheque given by the accused would be honoured and therefore accused has given a blank cheque before completion of the construction. Despite the non completion of the construction the complainant had filled the blank cheque and presented it for

encashment. There was no legally enforceable liability on the accused on the date of the cheque.

5. The learned Magistrate has held that the statutory notice Exhibit-37 was issued to the accused and in spite of that the accused has failed to make payment of the cheque within 15 days. However, it has been held that there was no legally enforceable debt or liability towards which the accused had issued cheque Exhibit-35. The question, therefore, is when the accused had admitted that the blank cheque was given by him, then the complainant might be having right to fill in the blanks. Further, though certain decisions have been referred by the learned Magistrate in his Judgment, the point for consideration is, when the issuance of cheque is admitted, then, whether the complainant was required to prove, by adducing proper evidence, that there was legally enforceable debt or liability. When presumption under Section 139 of the N.I. Act can be invoked, whether the evidence adduced by the accused in rebuttal was sufficient to discharge the onus. It appears to be not the part of the agreement that a blank cheque should be given by the accused as a security till the completion of the construction. Witness Ajay Govind Ghodke in his examination-in-chief stated that completion certificate was issued after

completion of the construction. The completion certificate has been issued on 29th September 2016 and the cheque appears to have been issued on 26th November 2016. The accused has not entered the witness box but gave his statement in writing. Whether that can be said to be evidence in rebuttal is also a question and therefore, case is made out to admit the appeal by allowing the application. Accordingly, following order is passed:-

ORDER

- (I) Application stands allowed.
- (II) Leave is granted to the applicant to file Appeal.
- (III) Registry to register the Appeal.
- (IV) Appeal is **admitted**.

[SMT. VIBHA KANKANWADI , J.]