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

CRIMINAL APPLICATION [APL] NO.532 OF 2022

Applicant	:	**Wazir Shah s/o Kasam Shah,** Aged about 64 years, Occupation : Agriculturist, R/o Tajnagar, Jalgaon Jamod, Tah. Jalgaon Jamod, Dist. Buldana.
		– Versus –
Non-Applicant	:	**Sheikh Mustaque Sheikh Isa,** Aged about 54 years, Occupation ; Agriculturist, R/o Sultanpura, Jalgaon Jamod, Tq. Jalgaon Jamod, Dist. Buldana.

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Mr. Ram Karode, Mr. Irfan Tafazzul and Mr. Shirish Marode, Advocates for the Applicant.
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CORAM : VINAY JOSHI, J.
DATE : 4th OCTOBER, 2022.

ORAL JUDGMENT :-

Admit.

02] Heard the learned Counsel appearing for the applicant. The non-applicant though served, remained absent. This Court on the last date clarified that if the non-applicant remains absent on next date i.e. today, the matter will be decided on merits. In view of that, having no other alternative, the matter is taken up for final disposal.

03] The applicant has filed a private complaint bearing SCC No.43/2018 against the non-applicant for the offence punishable under Section 138 of the Negotiable Instruments Act ('N.I. Act' for short). It is the applicant's case that he had received substantial sum from sale of land. The non-applicant (accused), who was of his acquaintance, has demanded hand loan of Rs.5,00,000/- on 04/06/2018. In response, the applicant (complainant) gave hand loan of Rs.4,75,000/- to the accused on assurance of repayment within 4 to 5 days. The accused has also handed over a cheque towards security. Since, the accused has not repaid the hand loan within the stipulated period, the complainant has deposited the cheque with his banker, which was dishonoured for the reason of insufficiency of funds. After complying the statutory formalities, the complainant has filed private complaint for the offence punishable under Section 138 of the N.I. Act.

04] The learned Magistrate, by taking cognizance of the complaint, has issued process in terms of Section 204 of the Code of Criminal Procedure. The legality of the said order was questioned by the accused in Criminal Revision No.40/18. The revisional Court has reversed the order of issuance of process and disposed of the complaint vide impugned order dated 30/03/2022.

05] The learned Counsel appearing fort the complainant has strongly assailed the impugned order by stating that the revisional Court, without adhering to the principles of law, has set aside the order of issuance of process. Though the complaint bears essential ingredients to constitute the offence, the revisional Court by assigning perfunctory reasons has set aside the order of issuance of process. The impugned order bears a reference that the disputed cheque was issued towards security. However, the learned revisional Court held that the complaint is bereft of details about the date of transaction, issuance of cheuqe, liability to pay the cheque amount and the condition of the cheque. On the said premise, the order of issuance of process was reversed.

06] The learned Counsel appearing for the applicant took me through the complaint to contend that it bears necessary particulars. Moreover, it is submitted that at the stage of taking cognizance, the contents of complaint have to be read to construe the *prima facie* case. Paragraph 4 of the complaint specifically bears a reference that on 04/06/2018, the accused had demanded hand loan, which he paid. It was assured by the accused to repay the hand loan within 4-5 days and with such assurance the impugned cheque was given towards security. Thus, there is sufficient material to indicate, as to for what reason the amount was paid and why the cheque was handed over to the complainant.

07] It is argued that merely because the cheque was issued towards security, it does not mean that the provisions of Section 138 of the N.I. Act would not apply. In this regard, he relied on the decision of the Supreme Court in the case of *Womb Laboratories Private Limited vs. Vijay Ahuja and another – 2019 DGLS (SC) 1215*, wherein it is observed that handing over cheque by way of security *per se* would not extricate the accused from the discharge of liability at initial stage. Further reliance is on the decision of the Supreme Court in the case of *Sampelly Satyanarayana Rao vs. Indian Renewable Energy Development Agency Limited – 2016 AIR (SC) 4363*, wherein similarly it is held that the dishonour of the postdated cheque given for repayment of loan, which is described as security, is covered under Section 138 of the N.I. Act.

08] The applicant's learned Counsel by placing reliance on the decision of the Supreme Court in the case of *Sripati Singh (since deceased) through his Son Gaurav Singh vs. State of Jharkhand and another – 2021 AIR (SC) 5732,* would submit that the cheque was issued towards financial transaction with assurance to pay the amount and thus even though it was towards security, the offence attracts. Particularly, he took me through paragraph 16 of the judgment, which reads as below :

> *"16. A cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow."*

09] Likewise, reliance is placed on the decision of this Court in the case of *Umakant s/o Girdharrao Shirure vs. Balasaheb s/o Gyanoba Gaikwad* in Criminal Appeal No.311 of 2005, wherein this Court took a view that merely because the cheque was issued as a security, it is not beyond the purview of the provisions of Section 138 of the N.I. Act. Herein, the complainant came with a specific case that he has advanced money to the accused on assurance of repayment within stipulated period and towards security to the assurance, cheque was issued. Obviously, with an understanding that in case of failure to pay the hand loan, the amount would be recovered by encashing the cheque. Thus, failure to pay the money within assured period creates obligation for paying the amount of cheque meaning thereby satisfying the cheque amount.

10] It is settled law that at the time of taking cognizance, the learned Magistrate is expected to find out whether a *prima facie* case to proceed further has been made out, and not to see whether the prosecution would indeed record conviction. The complaint discloses that the cheque was issued towards monetary transaction, it was dishonoured, statutory notice was issued and thus it discloses the *prima facie* ingredients for issuance of process.

11] In that view of the matter, the impugned order passed by the learned Session Judge is unsustainable in the eyes of law and, therefore, the order dated 30/03/2022 passed in Criminal Revision No.40/2018 is quashed and set aside. The trial Court shall proceed with the complaint in accordance with law. The application stands disposed of in the above terms.

(VINAY JOSHI, J.)

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