

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO FILE APPEAL

BY PRIVATE PARTY NO. 1 OF 2021

Govind Javaharlal Mundada
Age : 46 yrs, occ : business
R/o 7/4/143, Nageshwarwadi,
Priyadarshani Nagar,
Aurangabad

Applicant

Versus

Digambar Ramrao Burkul
Age : 56 yrs, occ : business
R/o Plot No. 77, Gut No.138,
Kumavat Nagar, Satara Parisar,
Aurangabad

Respondent

...

Mr. Shankar B. Kendre, Advocate holding for
Mr. Sachin S. Panale, Advocate for the applicant.
Mr. B.G. Lathe, Advocate for the respondent.

...

CORAM : SANDIPKUMAR C. MORE, J.

Dated : 25th August 2023

Order :

1. The applicant, who is the original complainant in S.C.C. No. 5033/2018, is seeking leave to file appeal challenging the judgment and order of acquittal of the present respondent under Section 138 of Negotiable Instruments Act (for short, "N.I. Act") passed by the learned Judicial Magistrate, First Class (Court No.12), Aurangabad (hereinafter referred to as "the learned trial Court") on 28.10.2020.

2. Learned Counsel for the applicant/complainant submits that the learned trial Court acquitted the respondent/accused mainly on the grounds that the applicant could not establish the fact that the cheque in dispute was given by the respondent in discharge of legally recoverable debt and that the applicant could not establish his capacity of giving hand loan of Rs. 1,50,000/- to the respondent. He pointed out that the learned trial Court erred in acquitting the respondent by ignoring presumption under Sections 118 and 119 of the N.I. Act.

3. On the contrary, learned Counsel for the respondent / accused strongly opposed the application by justifying the findings recorded by the learned trial Court while acquitting the respondent. According to him, though the respondent did not lead any evidence, but from the glaring admissions by the applicant himself before the trial Court, the defence of the respondent has been established and the presumptions under Section 139 of the N.I. Act stood rebutted in the light of preponderance of probabilities which reflected from the material on record. As such, he prayed for dismissal of the application.

4. Heard rival submissions. Also perused the documents on record alongwith the impugned judgment.

5. It is significant to note that the applicant has claimed that out of friendly relationship with the respondent, he gave an amount of Rs. 1,50,000/- to the respondent on his request for expanding his business of Zanzanit Vada Pav Centre. The record shows that the cheque issued by the respondent in lieu of the aforesaid hand loan, got dishonoured for the reasons "drawers signature differs". Defence of the respondent appears to be of total denial and that he had never issued such cheque. Though the applicant examined himself and one witness Pankaj Shete in whose presence the said hand loan transaction was made, but, in the cross-examination itself the applicant/complainant has given vital admissions which indicated that no such transaction had taken place between himself and the respondent / accused.

6. Admittedly, there is presumption under Sections 118 of 139 of the N.I. Act in favour of the holder of cheque that unless contrary is proved, the presumption is in favour of holder of the cheque that the same must have issued for discharge of debt or liability. The language of the aforesaid

sections itself clarifies that the aforesaid presumption is rebuttable one and the accused can rebut it without entering into witness box. This aspect has been settled by the Hon'ble Apex Court in the case of *Basalingappa vs Mudibasappa* in *Criminal Appeal No.636 of 2019*. It has been held that the presumption under Section 139 is rebuttable and the onus is on the accused to raise probable defence. Further, it is also observed that for rebutting such presumption it is not necessary for the accused to lead the evidence, but he can also rely on the material submitted by the complainant in order to raise a probable defence. Moreover, inference of preponderance of probabilities can also be drawn from the material brought on record.

7. Here in this case though the complainant i.e. the present applicant led evidence in support of his case in the chief examination as per the complaint, but he has given vital admissions in the cross-examination. The applicant has admitted in his cross-examination that he did not mention the amount of Rs. 1,50,000/- i.e. the amount of disputed cheque, in his income tax returns. Further, he could not adduce any documentary evidence in respect of the alleged business of the accused of Zanzanit Vada Pav Centre.

Though it is claimed by the applicant that at the time of the alleged transaction he was having an amount of Rs. 1,50,000/- in cash which was earned by him from the business and Bhisi, but there is no supporting evidence to that effect on record. As such, it appears that the primary burden to prove that the cheque was issued by the respondent in discharge of any legal debt has not been discharged by the applicant with the help of satisfactory and cogent evidence. On the contrary, it appears that such primary burden has been rebutted by the respondent/accused on the basis of admissions given by the applicant in his cross-examination and for want of supporting documents in respect of his capacity of having the aforesaid amount of Rs.1,50,000/-. Thus, it appears that the applicant could not discharge the initial burden for showing that the cheque was issued by the respondent out of legally enforceable debt. As such, there is no apparent perversity in the impugned judgment which resulted in acquittal of the respondent.

8. Thus, considering all the above facts, the present application stands rejected.

(SANDIPKUMAR C. MORE, J.)