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

**CRIMINAL APPLICATION FOR LEAVE TO APPEAL BY
PRIVATE PARTY NO. 06 OF 2021**

Shankar s/o Raosaheb Rathod,
age: 49 years, Occ: Service,
R/o Shri Sadguru Sadan,
Pangari Road, Beed,
Tq. & District Beed. Applicant

Versus

Arjun s/o Harischandra Rathod,
age: 51 years, Occ: Driver,
R/o C/o Poonam d/o Arjun Rathod,
Ramabai Chowk, Behind Gramin
Police Station, Police Colony,
Ambajogai, Tq. Ambajogai,
District Beed. Respondents

Mr. V. A. Mundhe, advocate holding for Mr. S. S. Thombre, advocate for the Applicant
Ms. Ashwini A. Lomte, advocate for the Respondent-sole.

CORAM : SANDIPKUMAR C. MORE, J.
DATE : 04th NOVEMBER, 2023.

ORDER :

1 The applicant i.e. original complainant is seeking leave to challenge the judgment and order dated 17.02.2021, passed by the learned Judicial Magistrate, First Class, 1st

Court Beed in S.C.C. No. 1987/2017, whereby the respondent-accused has been acquitted from the charge under Section 138 of the Negotiable Instruments Act.

2 The learned Counsel for the applicant submits that the complainant-applicant had, in fact, proved withdrawal of amount of Rs.3,00,000/-, out of which, he gave amount of Rs.2,50,000/- as hand loan to the present respondent-accused, who is also his relative. He pointed out that the learned Trial Court wrongly observed that there was no evidence on record as to when the said amount of Rs.2,50,000/- was given to the respondent-accused by the applicant-complainant. According to him, there was no necessity of such supporting evidence as withdrawal of the amount has already been proved by the complainant. He also relied on the following judgments:

{i} In the case of **Shree Daneshwari Traders Vs. Sanjay Jain and another**, (2019) 16 SCC 83; and

{ii} In the case of **Sripati Singh (since deceased) through his son Gaurav Singh Vs. The State of Jharkhand & another** (Criminal Appeal Nos.1269-1270 of 2021).

3 On the contrary, learned Counsel for the respondent-accused strongly opposed the application on the ground that the respondent has already rebutted the presumption under Sections 118 and 139 of the Negotiable Instruments Act by the material produced on record. She pointed out that the learned Trial Court has rightly held that the amount allegedly given to the respondent-accused by the complainant was not recoverable as legally enforceable debt or liability since it was found that the complainant was doing money lending business without license. She also pointed out that there was no such transaction of hand loan of Rs.2,50,000/-, but the cheque, which has been dishonoured, was in fact, given by the respondent-accused to the complainant as security for hand loan transaction of Rs.40,000/-, which the respondent had already repaid to the complainant. As such, she prayed for rejection of the application.

4 Heard rival submissions and also perused entire oral and documentary evidence on record along with Record and Proceeding of the original case.

5 On going through the impugned judgment, it appears that the learned trial Court has acquitted the respondent-accused mainly on the ground that the complainant could not establish the fact that there was hand loan of Rs.2,50,000/- between himself and the respondent and that it was revealed from the facts on record that the complainant was doing money lending business without license and, therefore, the amount of hand loan was not recoverable as legal liability. Admittedly, the applicant as well as respondent are relatives of each other. Though the applicant has claimed that on 08.08.2015, he gave an amount of Rs.2,50,000/- to the respondent-accused for purchasing a tempo by making certain withdrawal of amount from his account and to repay the said loan, the respondent had given him the cheque in dispute, but the respondent came with a story that there was no such transaction of Rs.2,50,000/- between him and the complainant, but he had, in fact, taken loan of Rs.40,000/- only and that too on 31.03.2015 and at that time, the complainant had obtained from him four blank cheques and one bond paper. Further, according to him, on 06.06.2016, he had already repaid the amount of Rs.40,000/-

along with interest of Rs.2000/-. However, the cheques, which were given as security to the said amount, were retained by the complainant and then misused.

6 It is pertinent to note that though the Hon'ble Apex Court, in the aforesaid judgments, has observed that it is not necessary to prove dishonour of cheque given as security on each and every occasion, but it has to be seen, whether there was any outstanding and in case of outstanding, the drawee can deposit the cheque given for security to take the amount. However, it is equally important to note that there is no supporting evidence on record when the applicant had actually given cash amount of Rs.2,50,000/- to the respondent-accused, especially when the respondent has totally denied that there was such transaction. It is settled that the respondent-accused needs to rebut the presumption not by strict proof, but it can be done on the preponderance of probabilities.

7 In the instant case, it is the defence of respondent-accused that there was hand loan transaction between himself

and the complainant only of Rs.40,000/- and that too on 31.03.2015 and at that time, the complainant had obtained four blank cheques and one bond paper from respondent for security of that loan. Further, the respondent is claiming that he had already repaid that amount of Rs.40,000/- along with interest of Rs.2000/- on 16.06.2016. It is extremely important to note that though the complainant is saying that hand loan transactions of Rs.2,50,000/- and Rs.40,000/- were two different transactions, but the complainant has admitted in his cross examination after denying the said loan transaction of Rs.40,000/- that he received the amount of Rs.42,000/- from the respondent-accused.

8 Moreover, it appears from the record that on the basis of the complaint by the respondent-accused, the concerned officer of the Co-operative Department conducted raid on the house of the applicant suspecting of money lending business and in the said raid, so many blank cheques of different persons along with bond papers were found in possession of the applicant. In those blank cheques, one blank cheque of respondent was also found along with one

bond paper in his name dated 22.08.2014. Though there are contrary orders of the Registrar, Co-Operative Societies as to whether the applicant was doing money lending business, but seizure of blank cheque signed by the respondent along with one bond paper in his name from the house of complainant definitely supports the defence of the respondent-accused. Moreover, the applicant has also given evasive answers even by denying the raid conducted at his house. He even denied that the respondent had given complaint against him to the District Sub-Registrar of Co-Operative Societies on 12.02.2019. He has admitted in the cross examination itself that at the time of said raid, certain blank cheques, issued by some other persons, were also found from his house. However, from the record itself, it has been revealed that such raid was conducted and the aforesaid documents were found in his possession. Thus, even if for the sake of argument, it is presumed that the applicant-complainant was doing money lending business, but seizure of blank cheque signed by the accused from his house along with bond paper in the name of accused, gives an impression that the cheque in dispute was also given to the complainant on 31.03.2015 for the transaction of hand loan of Rs.40,000/- along with other cheque and bond paper on 31.03.2015 and not on 17.08.2017, as claimed by the applicant.

9 Thus, it appears that the complainant has suppressed the true transaction between himself and the respondent-accused. Moreover, it appears that the complainant was involved in money lending business without license. As such, considering all these facts, it appears that the presumption under Section 139 of the Negotiable Instruments Act, which tends in favour of the applicant, has been successfully rebutted by the respondent-accused.

10 Thus, I do not find any perversity in the judgment of the learned Trial Court and, therefore, Criminal Application seeking leave to appeal stands rejected.

SANDIPKUMAR C. MORE
JUDGE

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