

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO FILE APPEAL BY PRIVATE
PARTY NO. 38 OF 2022

WITH

APPLICATION FOR LEAVE TO FILE APPEAL BY PRIVATE
PARTY NO. 39 OF 2022

Mrs. Reshma w/oSanjay Karwa
Age : 51 yrs, occ : business
R/o Phonenix One, Bangalore
West, 6211, Dr. Rajkumar Road,
Opp. Orion Mall, Rajajinagar,
Bengaluru, Karnataka

Applicant

Versus

Nitin Ashok Pagaria
Age : major,occ : business
R/o 103, "Raj Mahal",
Fatelal Path, Law College
Road, Pune.

Respondent

...

Mr. Rameshwar F. Totala, Advocate holding for
Mr. Swapnil Lohiya, Advocate for the applicant.
Mr. Sachin S. Panale, Advocate for the respondent.

...

CORAM : SANDIPKUMAR C. MORE, J.

Dated : 28th August 2023

Order :

1. The applicant/original complainant in S.C.C. No.7685/2015 and S.C.C. No.800/2016 is seeking leave to file appeal for challenging the acquittal of the respondent i.e. original accused in the aforesaid cases from the charge under Section 138 of the Negotiable Instruments Act (for short, "N.I.

Act") by the learned Judicial Magistrate, First Class (Court No.12), Aurangabad (hereinafter referred to as "the learned Magistrate") on 18.12.2021.

2. According to the applicant/complainant, she is having friendly and family relations with the respondent / accused who was in need of money, and therefore, agreed to sell his agricultural land Gut No.58 of Wadgaon, Taluka Gangapur, District Aurangabad for the consideration of Rs.21,00,000/- to the applicant. He also executed an agreement for sale in favour of the applicant/complainant on 09.07.2014. The applicant paid an amount of Rs.20,00,000/- as an earnest money to the respondent through cheque. Sale deed was to be executed after six months i.e. upto 09.02.2015 on payment of balance amount of Rs. 1,00,000/-. However, respondent / accused expressed his intention to cancel the agreement of sale and issued cheque of Rs. 20,00,000/- dated 07.09.2015 for refund of earnest money. In the meanwhile, he also paid an amount of Rs. 4,00,000/- through R.T.G.S. to the applicant on 25.07.2015. However, he did not pay the remaining amount. The applicant, therefore, presented the aforesaid cheque in her bank account, but it was dishonoured due to insufficient funds in the bank account of the accused.

On sending demand notice to the respondent / accused, he replied the same on 20.10.2015. Therefore, the aforesaid complaint bearing S.C.C.No. 7685/2015 was filed.

3. Thereafter the respondent again offered Rs. 3,00,000/- to the applicant by issuing two cheques and assured repayment of balance amount of Rs. 13,00,000/- as early as possible. However, both those cheques got dishonoured when presented to the bank account of the applicant. The applicant again issued statutory notice to the respondent, but it was not replied by him despite having been received the same. As such, the second case bearing S.C.C. No.800/2016 was filed against the respondent. Admittedly, the learned Magistrate acquitted the respondent in both these cases and hence these applications.

4. Learned Counsel for the applicant strongly submits that the learned Magistrate, after having held that the respondent / accused admitted the terms of agreement of sale, denied the nature of transaction merely on the basis of the admissions given by the applicant and her brother Sandip. According to him, the learned Magistrate has wrongly given finding in the affirmative that the respondent/ accused proved that agreement of sale was executed and

three cheques were issued for security for loan amount of Rs. 20,00,000/-. He further pointed out that there was no privity of contract between the brother of applicant and respondent/accused and yet wrong inference has been drawn by the learned Magistrate that it was a money lending transaction. He further argued that the documents filed by the respondent were exhibited without calling concerned witnesses to prove the certificate under Section 65-B of the Indian Evidence Act.

5. On the contrary, the learned Counsel for the respondent / accused strongly opposed the applications on the ground that vital admissions are given by the applicant as well as her brother Sandip in their cross-examinations which indicated that the transaction between the applicant and respondent was in fact of money lending which was monitored by Sandip i.e. brother of the applicant, and therefore, the learned Magistrate rightly acquitted the respondent/accused.

6. Both the learned Counsel for the rival parties relied upon on the following judgments :

Judgments relied on by the applicant :

*(i) M. Abbas Haji vs T.N. Channakeshava,
(2019) 9 SCC 606*

(ii) Rangappa vs Sri Mohan (2010) 11 SCC 441

Judgments relied on by the respondent :

- (i) Basalingappa vs Mudibasappa, (2019) 5 SCC 418*
- (ii) M.S. Narayana Menon @ Mani vs State of Kerala 2006 (5) Mh.L.J.676*
- (iii) K. Prakashan vs P.K. Surenderan, 2007 STPL (DC) 1473*
- (iv) Messrs Biharilal Raranarayan Mantri vs Anil Narottamdas sahad and another, 2019 ACD 167*
- (v) Sanjay Yadhavraoji Makode vs Suhas Prakashji Dhote 2018 (4) Bom.C.R. (Cri.) 198.*

7. Admittedly, the learned Magistrate has acquitted the present respondent/accused by holding that nature of transaction between the applicant and respondent was of money lending and the agreement for sale in question was nominally executed for security purpose of the said money lending transaction. However, the learned Magistrate has observed that the respondent/accused had not denied execution of agreement of sale and in his chief examination in S.C.C. No. 800/2016 had admitted the terms of agreement clearly. Moreover, it appears that the statements of accounts generated electronically are exhibited at belated stage, and therefore, their admissibility in the evidence has been disputed by the learned Counsel for the applicant. It is not denied by the applicant that her brother Sandip is Money Lender, but she has disputed that the cheques in question

were never issued in connection of money lending business between the respondent/accused and her brother Sandip.

8. It is to be noted here that the application for leave to file appeal needs to be decided very carefully, since refusal of the same would result in closure of statutory right of the applicant to challenge the impugned order. Here in this case, though the learned Magistrate has inferred that the nature of transaction between the applicant and respondent was of money lending and not of the agreement of sale, but when execution of agreement of sale is not denied by the respondent, some fresh consideration as regards the nature of such transaction is required in the appeal considering the totality of circumstances. Moreover, the judgments relied on by the rival parties can also be considered at the time of final hearing of the appeal. Hence, I am of the opinion that the applicant has made out at least an arguable case, and therefore, the applications are allowed and the appeals of the applicant against acquittal of respondent/accused be registered after removal of office objections, if any.

9. Both the applications are accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)