

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

**APPLICATION FOR LEAVE TO APPEAL
BY PRIVATE PARTY NO. 42 OF 2022**

Mustafa s/o Alisaheb Haware,
age: 62 years, Occ: Business,
R/o Mandai Peth, Paranda,
Tq. Paranda, District Osmanabad. Applicant

Versus

01 Ladlesaheb Nabilal Momin,
age: 55 years, Occ: Business;

02 Akbar Ladlesaheb Momin,
age: 30 years, Occ: Business;

Both R/o Survey No. 101,
Janta Vasahat, Nanath Society,
Behind Manjul Mitra Mandal,
Janwadi, Pune. Respondents

Mr. Sandeep Y. Mahajan, advocate for the Applicant
Mr. Shaikh Shoyab, advocate for Respondents

**CORAM : SANDIPKUMAR C. MORE, J.
DATE : 19th OCTOBER, 2023.**

P.C. :

1 The applicant-original complainant is seeking leave to file appeal against the acquittal of respondents-original accused in SCC No. 516 of 2017, under judgment and order

dated 04.01.2022, passed by the learned Judicial Magistrate, First Class, Paranda, District Osmanabad.

2 The learned Counsel for the applicant-complainant submits that the learned Judicial Magistrate, First Class, Paranda, has definitely erred in acquitting the respondents-accused by holding that the cheque in dispute was not issued in discharge of legally enforceable debt or the said cheque was not issued in respect of any legally recoverable debt. According to him, issuance of the cheque and dishonour of the same, is not disputed and, therefore, the learned Judicial Magistrate, First Class, Paranda, should have convicted the respondents-accused by applying statutory presumption under Section 139 of the Negotiable Instruments Act, 1881.

3 On the contrary, learned Counsel for the respondents-accused strongly opposed the submissions made on behalf of the applicant-complainant. According to him, respondents-accused, by way of preponderance of probabilities, have already rebutted the aforesaid presumption under Section 139 of the Negotiable Instruments Act on the

basis of vital admissions given by the applicant as well as his witnesses. As such, he prayed for rejection of the application.

4 Heard rival submissions and perused the documents along with copies of depositions and other material on record.

5 Admittedly, accused no.1 has not denied issuance of disputed cheque by him which got dishonoured subsequently. However, as per the defence of the accused, the cheque in dispute was given by accused no.1 for security of earlier transaction of hand loan which he had taken from the complainant for expenses of marriage and the same was not issued for the transaction in respect of purchase of car, as claimed by the complainant in the present case. Further, it is settled position from the observations of the Hon'ble Apex Court in the judgment in the case of **P. Rasiya Vs. Abdul Nazer and another**, AIR Online 2022 SC 1373, that when it is not disputed by the accused that he had signed and issued the cheque in dispute, then the complainant need not to establish that the cheque in dispute was issued for legally

recoverable debt. The learned Counsel for the applicant, therefore, submits that when the respondents-accused have not disputed the signature over the cheque being of accused no.1 and issuance of same, then the learned Judicial Magistrate, First Class, Paranda, should not have acquitted them.

6 From the record, it is apparent that, according to the complainant, the cheque in dispute was issued by accused no.1 for refund of earnest money which was paid to him by the complainant at the time of purchase of TATA Indiga Vista car of the accused. It further appears that the remaining part of consideration amount of the car was to be paid on completing the formalities of transfer of the vehicle, taxes, insurance by the accused, but on such failure the complainant decided to revoke the said transaction and a deed dated 04.03.2017 was executed between the accused no.2 and the son of the complainant. As per the said contract of revoking the earlier transaction of sale of aforesaid car, the cheque in dispute was issued, which was subsequently got dishonoured. The statutory notice and its receipt is not disputed. Further, it is

also not disputed that the respondents-accused did not reply the said notice.

7 The deed of revocation of the transaction of sale of car is produced at Exhibit-70 by the applicant-complainant. On perusal of the same, it appears that the said contract is between son of the applicant and accused no.2, who is son of accused-respondent no.1. As such, the complainant and accused-respondent no.1 are neither parties nor the signatories to the aforesaid contract. Further, in the said deed, one cheque No.0005731 was shown to be issued for return of earnest money, but it is surprising to note that the cheque, in dispute, is different from the said cheque and it is having number 658946. Thus, it clearly indicates that the cheque in dispute was not the cheque given to the applicant by accused no.1 in respect of his story of revocation of contract. Further, when there was transaction between the son of the applicant and accused no.2, then accused no.2 would have issued the cheque from his account, but that is not the case in this matter. Even if it is assumed that accused no.1 i.e. present respondent no.1, on behalf of his son, had issued the

cheque in dispute, but there was no reason for him to issue such cheque in the name of the applicant-complainant. He could have issued the cheque in the name of Gazi i.e. son of the applicant. It is settled position that the accused can rebut the presumption under Section 139 of the Negotiable Instruments Act by bringing on record preponderance of probabilities. He need not to enter into witness box for the same and such rebuttal can be based on the material on record produced by either parties or the admissions given by the complainant and his witnesses.

8 It is extremely important to note that the applicant and his son Gazi have clearly admitted that the applicant had advanced hand loan to Respondent no.1-accused to meet the expenses of marriage and the same was never repaid. Thus, on such admission, defence of respondents-accused, that the cheque in dispute was given for earlier transaction, inspires confidence. Though the respondents did not reply the statutory notice issued by the applicant-complainant in respect of dishonour of cheque, but from the aforesaid circumstances on record, it has been transpired that the

disputed cheque was not issued in the lieu of revocation of the contract, as claimed by the applicant-complainant. Moreover, from the admissions given by the applicant and his witnesses, it has been made sufficiently clear that the disputed cheque was not issued out of any legally recoverable debt or liability.

9 Thus, considering all these aspects, I see no perversity in the judgment of the learned Judicial Magistrate, First Class, Paranda, for acquitting the respondents-accused. No leave, therefore, can be granted, as prayed by the applicant-complainant.

10 Hence, Criminal Application seeking leave to file appeal stands dismissed.

SANDIPKUMAR C. MORE
JUDGE

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