IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY NO. 44 OF 2022

Mandabai Devidas Punekar,
Age : 60 years, Occ. : Housewife,
R/o. : Udgir, Tq. Udgir,
Nayi Abadi Udgir, Dist. Latur **... Applicant**
(Ori. Complainant)

VERSUS

Raisabugum Shaikh Rafeeq,
Age : 63 years, Occ. : Housewife,
R/o. : Nideban Ves, Siddharth Nagar,
behind Acharya Vinoba Bhave School,
Dadarao Niwas, Udgir,
Tq. Udgir, Dist. Latur **... Respondent**
(Ori. Accused)

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Mr. Ameya N. Sabnis – Advocate for Applicant
Mr. Ram S. Shinde – Advocate for Respondent

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CORAM : SANDIPKUMAR C. MORE, J.
DATE : 7th November, 2023

ORDER :

1. The present applicant i.e. original complainant in S.C.C. No.1300105 of 2021 is seeking leave to challenge the judgment and order in the aforesaid case dated 28th January, 2022 passed by the learned Judicial Magistrate First Class, Udgir [Court No.2] (hereinafter referred to as *"the learned Trial Court"*) whereby the

present respondent – accused has been acquitted from the charge under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as *“the N.I. Act”*).

2. Learned Counsel for applicant – complainant submits that, the complainant has given handloan of Rs.1,85,000/- out of acquaintance and in turn the respondent had given her cheque in dispute which was subsequently dishonored. Learned Counsel further submits that, despite statutory notice the respondent failed to reply the same. He pointed out that, issuance of cheque is admitted and, therefore, presumption under Section 139 of the N.I. Act is there against the respondent – accused. He pointed out that, the learned Trial Court wrongly held that, the applicant was not having any financial capacity to lend the such amount of Rs.1,85,000/-. He further argued that, there was no necessity for the complainant to mention in the statutory notice itself that, when the said amount was actually given to respondent and in what manner it was given. Besides, these submissions learned Counsel for applicant also relied upon the following judgments :

(a) Hon’ble Supreme Court in the case of **Krishna Exports and Ors. Vs. Raju Das** reported in *(2004) 13 SCC 498*

(b) Hon’ble Supreme Court in the case of **Tedhi Singh Vs. Narayan Dass Mahant** reported in *(2022) 6 SCC 735*

3. On the contrary, learned Counsel for respondent – accused strongly opposed the application on the ground that, whatever the reasons mentioned by the complainant for giving the cheque to respondent are false and in fact the complainant had misused the cheque issued by the respondent by way of security to the earlier hand-loan amount which she had already paid.

4. Heard rival submissions and also perused the documents on record. On going through the impugned judgment *prima–facie* it appears that, the learned Trial Court had acquitted the present respondent – accused on the grounds that, the complainant could not establish the fact that, she was having income source to lend the amount of disputed cheque and that she failed to mention all the relevant facts. As per the case, it appears that the complainant has not mentioned all the facts in respect of transaction in the demand notice and that the reason for which the applicant alleging that the cheque amount was given to respondent were found to be false. Besides, the learned Trial Court also held that there might be possibility of using the cheque which was earlier given by the

respondent – accused to the applicant by way of security of earlier hand-loan of Rs.15,000/- only.

5. Learned Counsel for the applicant heavily relied upon the judgment in the case of **Krishna Exports and Ors.** (*supra*) on the aspect of contents of statutory notice. The Hon'ble Apex Court in the said case has observed that, "notice or letter sent to the accused asking for immediate repayment of the amount of the cheque would amount to notice under Section 138 proviso (c)". However, the said observation has come on record while the Hon'ble Apex Court was dealing with the question whether the said notice was time barred or not. Even if it is not mentioned by the applicant – complainant in the statutory notice in this case about necessary particulars of transaction, but she is definitely under obligation to establish those facts before the Court.

6. It is the case of applicant that, she had given the cheque amount for the purpose of marriages of son and daughters of respondent – accused in presence of witnesses. However, no specific date is mentioned in the complaint. Moreover, the witness by name Anusayabai Pandhari Kamble examined by the applicant, also did not mention any specific date on which the cheque

amount of disputed cheque was given to respondent – accused. Thus, the complainant not only failed to mention the particulars of the transaction of the cheque amount with respondent in the demand notice, but also failed in mentioning the same in the complaint itself.

7. Further, learned Counsel also relied on the judgment of Hon'ble Apex Court in the case of **Tedhi Singh** (*supra*), wherein it is held that, "the complainant need not to establish his financial capacity unless the accused sets up a case questioning the complainant's capacity in reply to statutory notice". Admittedly, the present respondent – accused had not replied the statutory notice of applicant but it is also observed in the aforesaid case (*cited supra*) that, *"accused can set up such a case by producing independent materials or by pointing to materials produced by complainant himself or cross–examining witnesses of complainant"*. It is specifically observed that, *"the Court has to decide the case by appreciating totality of evidence"*. In the instant case, accused has definitely raised question of financial capacity of complainant for lending such amount of Rs.1,85,000/-. Therefore, complainant was definitely under obligation to establish such source. Despite oral

statement in the cross-examination, applicant did not produce any documentary evidence on record about her income. On the contrary, she herself stated her occupation in the complaint as household. Thus, the learned Trial Court has rightly suspected financial capacity of applicant.

8. Further, it is claimed by applicant – complainant that, she had given the amount of disputed cheque for marriages of son and daughters of respondent – accused. However it appears that, the transaction between the applicant and respondent was of the year 2009, but the complainant herself admitted in her cross-examination that marriages of son and daughters of respondent – accused had taken place in the years 2002, 2005 and 2008. This admission itself has falsified the story of applicant that, for the purpose of marriages of daughters and son of respondent she had given amount of disputed cheque. Further, respondent has examined one witness by name Dr. Shailesh Sangajkar, who was handwriting expert. On going through his evidence it reveals that, the contents of disputed cheque were written on different dates. According to him, the ink in which the signature made on the said cheque was found 12 to 15 years old whereas the ink in which the

other contents of the cheque were written was found 8 to 10 years old. Considering the aforesaid period it appears that, the same must have signed somewhere in the year 2007 and thereafter other contents were written subsequently. This supports the defence raised by respondent that, she had given the said cheque by way of security to applicant in respect of earlier hand-loan which was taken by her in the year 2007. The learned Trial Court has also observed this fact and raised doubt as to how respondent had used three different pens at the same time while issuing the cheque in dispute.

9. Thus, considering all these aspects it appears that, the observation of learned Trial Court that, the respondent – accused has rebutted the presumption under Section 139 of the N.I. Act successfully, appears appropriate. In view of the same, I am not inclined to grant any leave to challenge the aforesaid judgment and, therefore, application stands dismissed.

[SANDIPKUMAR C. MORE]
JUDGE

Pooja Kale