IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT PARTY
NO. 56 OF 2022

Murliwala Builder,
Through its partners

1. Anil Vishwanath Sharma,
Age : 53 years, Occ. : Business,
R/o. : Plot No.4, Flat No.5, Priya Apartment,
N-2, A, CIDCO, Aurangabad

2. Bharatkumar Ramnivas Sharma,
Age : 49 years, Occ. : Business,
R/o. : Plot No.75, Flat No.2,
Classic Residency, Uttara Nagri,
Aurangabad **... Applicants/Appellants**
(Ori. Complainants)

VERSUS

Satyanarayan Anandilal Sharma,
As authorized signatory of Satyam Infra,
Age : 65 years, Occ. : Business,
R/o. : Ramsiya Graynites Industries,
Plot No.151, 152, 153, 3rd phase,
RIICO, Industrial Area,
Jalore (Rajastan) - 343001 **... Respondent**
(Ori. Accused)

...

Mr. J.V. Deshpande h/f. A.S. Kulkarni – Advocate for Applicants
Ms. Y.S. Thorat – Advocate for sole Respondent

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CORAM : SANDIPKUMAR C. MORE, J.
DATE : 1st September, 2023

Pooja Kale

ORDER :

1. The appellant – firm, who is original complainant through its partners is seeking leave to file appeal to challenge the acquittal of present respondent i.e. original accused in Summary Criminal Case No. 9363 of 2017 from the charge punishable under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as *“the N.I. Act”*) under the judgment and order dated 23rd December, 2021 passed by the learned Additional Chief Judicial Magistrate, Aurangabad {Court No.11} (hereinafter referred to as *“the learned Trial Court”*).

2. **Background facts of the case are as under :**

The appellant – firm had three partners namely Anil Vishwanath Sharma, Bharatkumar Ramnivas Sharma and Murlidhar Anandilal Sharma i.e. real brother of present respondent – accused. The said firm obtained loan of Rs.1,50,00,000/- by mortgaging its four plots from the Kallappanna Awade Ichalkaranji Co-operative Bank Ltd., Branch at Aurangabad (hereinafter referred to as *“said bank”*). Accordingly, the said bank credited amount of Rs.1,30,00,000/- in the account of firm. However, Murlidhar Anandilal Sharma fraudulently diverted the amount of Rs.1,29,25,5000/- in the account of Anand Builders and Developers wherein his brother i.e. present respondent and his wife were the respective partners somewhere in the year 2014-2015. Due to such transfer, other two partners of the appellant – firm lodged police complaint in the year 2016 and a compromise between the appellant – firm and respondent – accused took place in connection of said complaint. Thereafter, in the year 2016 as per compromise, the respondent by mortgaging his two row houses amounting to Rs.50,00,000/- issued a cheque of Rs.79,25,000/- in the name of appellant – firm from the account of his company – Satyam Infra. The said cheque was dishonored and therefore legal notice was issued to respondent – accused by the appellant – firm for payment of cheque amount, since it was not paid by the respondent. The appellant – firm filed the aforesaid complaint bearing Summary Criminal Case No.9363 of 2017 before the learned Trial Court. However, the learned Trial Court under impugned judgment and order dated 23rd December, 2021 acquitted the accused from the charge punishable under Section 138 of the N.I. Act. Hence, this application.

3. Learned Counsel for appellant – firm submits that, the

learned Trial Court has erred in acquitting the respondent – accused, despite the fact that the respondent had not denied his signature on the cheque in dispute. He pointed out that, the learned Trial Court completely ignored the presumptions under Section 118 and 139 of N.I. Act. He pointed out that, there was compromise between the respondent – accused and the appellant – firm after lodging police complaint in respect of diverting the funds of appellant – firm in the account of firm wherein wife and brother of Murlidahr Anandilal Sharma i.e. respondent, were partners. According to him, the learned Trial Court wrongly held that there was no notice to the firm of respondent – accused and the cheque was not issued for discharge of any legally enforceable debt.

4. On the contrary, learned Counsel for respondent supported the judgment and submitted that the respondent – accused has certainly rebutted the presumptions on the basis of evidence on record and though he did not lead any oral evidence but produced the compromise between the appellant – firm and himself mentioning that, there was not assurance from the respondent – accused to repay any amount to the appellant – firm, but instead of that there was no dispute remained between himself and

appellant – firm under that agreement. She further submitted that, no legal notice was issued to the company of respondent and that the witness of appellant – firm himself had admitted in cross-examination that there was no transaction of appellant – firm either with the accused or his company known as "Satyam Infra". She relied on the judgments as discussed in the impugned judgment and also additionally relied upon the judgment of High Court of Uttarakhand at Nainital in the case of ***Ramesh Nagarkoti Vs. Kedar Datt Purohit*** reported in *2021 SCC OnLine Utt 745*.

5. Heard rival submissions and also perused the evidence on record alongwith the record and proceeding of the Summary Criminal Case No. 9363 of 2017.

6. Admittedly, the respondent – accused has acquitted by the learned Trial Court and on going through the judgment it appears that, the acquittal has come mainly on two grounds; that there was no notice issued to the company of respondent – accused and that the appellant – firm could not establish that the cheque in dispute was issued by the respondent to it for discharge of legally recoverable debt. It is significant to note that, the respondent has not disputed his signature on the cheque which was issued to the

appellant – firm. Thus, once the signature is admitted then the presumptions under Section 118 and 139 of N.I. Act come to the help of complainant for proving the fact that, the cheque is issued for discharge of legally recoverable debt. However, the wording of Sections 118 and 139 of N.I. Act itself suggest that, both these presumptions are rebuttable. It has been settled by the Hon'ble Apex Court that, if the accused succeeds in rebutting the aforesaid presumptions then he is entitled for acquittal. It is also settled by the Hon'ble Apex Court that, there is no need for the accused to lead the evidence for such rebuttal but for that purpose the evidence adduced on behalf of the appellant can also be relied upon. The High Court of Uttarakhand at Nainital has made following observations to that effect in the case of **Ramesh Nagarkoti** (*supra*), which reads as under :

> ***Under Section 139 of the Act, 1881, once a cheque has been signed and issued in favour of the holder, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability. However, this presumption is a rebuttable one. If the accused will able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. Onus is upon the accused to rebut the presumption and to establish that the cheque in***

question was not given in respect of any debt or liability, however, for which it is not necessary for the accused to disprove the existence of consideration by way of direct evidence, even the evidence adduced on behalf of the complainant can be relied upon.

7. The record shows that, the appellant – firm is claiming that in connection of criminal complaint lodged by other partners of appellant – firm against the respondent – accused the disputed cheque was given. The learned Counsel for appellant – firm made reference to the aforesaid compromise wherein the appellant – firm and the present respondent had resolved their dispute. The said compromise is at Exhibit – 25, but it is extremely important to note that on the basis of compromise the appellant – firm is claiming that, the chque in dispute is issued in terms of that settlement but the said compromise was not produced by the appellant – firm and instead of that the accused had brought it on record in the cross-examination of witness of appellant – firm. The learned Trial Court has reproduce the recitals of the said compromise in the judgment itself and on going through it nothing is mentioned there that the respondent – accused had in fact assured to repay any amount which had transferred by Murlidhar Anandilal Sharma i.e. one of the partners' of appellant – firm and also the brother of respondent

– accused in the account of Anand Builders and Developers. On the contrary, the partners of appellant – firm had agreed in that compromise that, whatever the amount was transferred by Murlidhar Anandilal Sharma in the account of Anand Builders and Developers as well as Marble Center and Granites was in fact used by them and Murlidhar Anandilal Sharma for the business of appellant – firm only. Thus, the aforesaid recitals clearly indicate that the present respondent – accused was not owing anything to the appellant – firm as per the aforesaid compromise.

8. Further, it is also important to note that, the witness No.1 of the appellant – firm i.e. one of its partner – Anil Vishwanath Sharma had rented his house to run the office of Satyam Infra firm in which the respondent and his son are the partners. Moreover, he also stated that, Bharat Ramnivas Sharma i.e. another partner of appellant – firm had worked with Satyam Infra firm for some time. It is the defence of the respondent – accused that, while working in his firm Satyam Infra the appellant – firm through its partners misused the disputed cheque. The complainant's witness No.1 has also admitted in clear terms in his cross-examination that the appellant – firm had no transaction either with the

respondent – accused in person or with Satyam Infra firm. Thus, it is clearly apparent from such admission that, in respect of amount of disputed cheque there was no transaction between the appellant – firm and the respondent.

9. Further, it is also important to note that, though the legal notice was issued to respondent in his personal capacity but no such notice was issued to Satyam Infra. Learned Counsel for the respondent heavily relied upon the observations of Hon'ble Apex Court in the case of ***Aneeta Hada Vs. Godfather Travels and Tours Private Ltd.***, reported in *(2012) 5 SCC 661* as discussed in the impugned judgment itself. In the aforesaid case it has been settled by the Hon'ble Apex Court that, the complaint under Section 138 of N.I. Act is not at all maintainable when no statutory notice is issued to the company without adding the company as an accused. The same view is followed by the High Court of Uttarakhand in case of **Ramesh Nagarkoti** (*supra*). Thus, considering all these facts it is evident that the appellant – firm could not establish that the cheque in dispute was issued by the respondent – accused for discharge of legally recoverable debt and that no notice to the company/firm of the respondent – accused which is necessary

according to law, was issued. Thus, it appears that, the respondent – accused has completely rebutted the presumptions under Section 118 and 139 of N.I. Act and, therefore, the acquittal of respondent at the hands of learned Trial Court appears proper. In view of the same, the present application stands rejected.

10. The application is accordingly disposed of.

[SANDIPKUMAR C. MORE]
JUDGE