IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT PARTY
NO. 100 OF 2022

New Bapte Kirana
Through its Proprietor,
Aarti Sainath Bapte,
Age : 39 years, Occ. : Business,
R/o. : Sangamner, Dist. Ahmednagar ... **Applicant/Appellant**
(Ori. Complainant)

VERSUS

1. Somnath Nivrutti Kawade,
Age : 45 years, Occ. : Agricuture,
R/o. : Chikhali, Tq. Sangamner,
Dist. Ahmednagar

2. The State of Maharashtra,
Through P.S.O., Sangamner, Tq. P.S.
Tq. Sangamner, Dist. Ahmednagar ... **Respondents**
(Resp. No.1 – Ori. Accused)

...

Mr. V.Y. Bhide – Advocate for Applicant
Mr. A.N. Nagargoje – Advocate for Respondent No.1
Mr. R.D. Sanap – APP for Respondent No.2, State

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CORAM : SANDIPKUMAR C. MORE, J.
DATE : 4th September, 2023

ORDER :

1. The applicant i.e. original complainant is seeking leave to file appeal challenging the acquittal of respondent No.1 – original accused in Summary Criminal Case No. 284 of 2017 from the

charge punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as *"the N.I. Act"*) under the judgment and order dated 17th August, 2022 passed by the Additional Chief Judicial Magistrate, Sangamner, Dist. Ahmednagar (hereinafter referred to as *"the learned Trial Court"*).

2. Learned Counsel for applicant – complainant submits that, the learned Trial Court has wrongly acquitted respondent No.1 – accused merely on the ground that, the attesting witness of contract of handloan was not examined and that there was no privity of contract in relation to alleged handloan between the accused and complainant. According to learned Counsel for applicant – accused i.e. respondent No.1 had not denied his signature on the cheque in dispute and therefore the presumptions under Sections 118 and 139 of the N.I. Act were activated in favour of the complainant absolving him from proving that, there was legally enforceable debt. In support of his submissions he relied upon the following judgments :

(a) ***Dr. Kailash Madanlal Charkha Vs. Sayyad Khwaja Sayyad Noor and Anr.,*** reported in ***2018 ALL MR (Cri) 2806***

(b) ***Prakash Balwantrao Bansod Vs. Sanjay***

Madhukar Aagare in Criminal Appeal No. 438 of 2010 reported in ***AIR Online 2020 Bom 646***

(c) ***Smt. Usha Suresh Vs. R.V. Shashidaran in Criminal Appeal No.1108 of 2005*** reported in ***2006 CRI. L. J. 904***

(d) ***Bir Singh Vs. Mukesh Kumar in Criminal Appeal Nos.230 – 231 of 2019 (arising out of SLP (Crl.) Nos.9334 – 35 of 2018)*** reported in ***2019 CRI. L. J. 3227***

3. On the contrary, learned Counsel for respondent No.1 – accused submits that, the complainant – firm through its proprietor, who is wife of one Sainath Bapte has admitted that, there was no transaction between herself and respondent No.1. Moreover, no cheque was issued in favour of Sainath Bapte from whom the respondent No.1 had taken handloan but the disputed cheque was in favour of New Bapate Kirana and, therefore, there was no privity between the complainant and accused. Learned Counsel for the respondent No.1 also relied upon the judgments mentioned in paragraph No.14 of the impugned judgment (the Bombay High Court in the case of ***Smt. Kamala Pyarelal Gupta Vs. Deepak Shriram Thorat*** reported in *2018 (3) DCR 100* and ***Patricio D'Souza Vs. Oscar D'souza and Anr.***, reported in *2009 (2) DCR 153*). The record shows that, there was handloan transaction between

the husband of proprietor of complainant shop and respondent No.1 but there was no such contract between complainant and respondent No.1 in respect of cheque amount. Admittedly, in the case of **Dr. Kailash Madanlal Charkha** (*supra*) relied upon by the applicant, this Court has taken a view that the defence of accused that complainant misused blank cheque despite frustration of oral agreement to sell plot to accused, not probable. Moreover, this Court in the case of **Prakash Balwantrao Bansod** (*supra*) has also observed that, once the accused admitted signature and issuance of cheque then presumptions under Sections 118 and 139 of the N.I. Act got activated in favour of complainant and therefore he need not to prove that there was legally enforceable debt.

4. Moreover, the Karnataka High Court in case of **Smt. Usha Suresh** (*supra*) has also observed similar opinion that, once the signature on the cheque is accepted and admitted by the accused the presumptions under Section 139 of N.I. Act has to be raised in favour of complainant. It is further observed by the Karnataka High Court that, even if the cheque is given in the name of wife for transaction between her husband and the accused, she becomes "holder in due course" and the creditor and, therefore, she is

entitled to seek prosecution of accused. At the same time, this Court in the case of **Smt. Kamala Pyarelal Gupta** (supra), this Court has taken contrary view by observing that, if handloan transaction between accused and husband of complainant, then it cannot he held that, cheque drawn in favour of the complainant for discharging legally enforceable liability.

5. In the impugned judgment itself in paragraph No.21, the learned Trial Court has observed that the signature on the cheque in question has been admitted by the accused by taking defence that, the applicant's husband misused his signed blank cheque and stamp paper. In view of such defence and contrary view taken by this Court in different cases as mentioned above, I am of the opinion that, the applicant has made out an arguable case which needs consideration in the appeal.

6. In view of the same, the application stands allowed and the appeal of the applicant be registered after removal of office objections, if any.

[SANDIPKUMAR C. MORE]
JUDGE

Pooja Kale