

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY
NO. 11 OF 2023

M/s Smiti Poultry Appliances, Sangamner,
Through its Proprietor,
Shri. Dattatraya Surybhan Upadhye,
Age : 44 years, Occ. : Business,
R/o. : Chikhali, Tq. Sangamner,
Dist. Ahmednagar

... Applicant/Appellant
(Ori. Complainant)

VERSUS

Sakharam Murlidhar Shete,
Age : 56 years, Occ. : Agri. & Poultry,
R/o. : Pimpalgaon Khand, Tq. Akole,
Dist. Ahmednagar

... Respondent
(Ori. Accused)

...

Mr. N.R. Thorat h/f. Mr. G.B. Kadlag – Advocate for Applicant
Mr. S.S. Dixit – Advocate for Respondent

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

ORDER :

1. The applicant – firm who is original complainant in S.C.C. No.53 of 2015 is seeking leave to file appeal against the judgment and order dated 1st February, 2020 passed by the learned Judicial Magistrate First Class, Akole [Court No.2], (hereinafter referred to as “*learned Trial Court*”) in the aforesaid case whereby the

respondent i.e. original accused has been acquitted.

2. Learned Counsel for applicant – complainant submits that, the issuance of cheque and signature thereon of the present respondent – accused was not disputed before the learned Trial Court and therefore the presumptions under Sections 118 and 139 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “*the N.I. Act*”) were in favour of applicant but the learned Trial Court erred in holding that those stood rebutted on the basis of admissions of applicant in the cross-examination. According to him, the applicant has atleast made out an arguable case, therefore, leave is required to be granted.

3. On the contrary, learned Counsel for respondent strongly supported the judgment and order of the learned Trial Court whereby the respondent has been acquitted. He pointed out that, the complainant could not establish that the disputed cheque was issued for discharge of legally recoverable debt. According to him, the complainant miserably failed to establish that he was working with respondent as a partner in the business. Moreover, he also could not produce on record any documentary evidence as to how he owed cheque amount to him. Learned Counsel for the

respondent also relied on following judgments :

- a. Bombay High Court bench at Nagpur in the case of **Ghanshyamdas Lalchand Chandak Vs. Sheikh Hamid Sheikh Gulab and Anr.**, in *Criminal Appeal No.536 of 2006* decided on 9th January, 2018
- b. Bombay High Court in the case of **Shivshankar B. Chaudhary Vs. State of Maharashtra and Anr.**, in *Criminal Revision Application No.220 of 2007* reported in *2010 (1) Bom.C.R. (Cri.) 132*

4. Heard rival submissions and also perused the documents on record. It is significant to note that, though the learned Trial Court was of the opinion that, the applicant proved the facts that the cheque was drawn by the respondent – accused and it got dishonored and that the complaint was filed within limitation, but the respondent has been acquitted mainly on the ground that the applicant – complainant could not establish the fact that the cheque in dispute was issued for discharge any legal debt or liability. Further, it appears that the learned Trial Court has also observed that, the accused i.e. present respondent had rebutted the presumptions under Sections 118 and 139 of the N.I. Act.

5. Admittedly, this Court in the case of **Ghanshyam Lalchand**

Chandak (*cited supra*) has made following observations :

The settled position of law is that if the signature on the cheque is admitted, the statutory presumption under Section 139 of the Act stands activated and the accused is obligated to rebut the presumption before the burden of proving the existence of debt or liability shifts to the complainant. However, the accused need not adduce direct evidence and is entitled to rely on the material brought on record, during the evidence of the complainant, or otherwise, to rebut the statutory presumption. The burden on the accused of proving the non-existence of debt or liability is duly discharged if the accused brings on record, on preponderance or probabilities, that the existence of a legally enforceable debt or liability is doubtful.

6. On going through these observations it is amply made clear that the accused need not to enter into witness box to discharge the burden of proving non existence of debt or liability but it can also be discharged from the material brought on record either by him or by the complainant. Even the admissions given by complainant in his cross-examination can also be used for discharge of such burden and for rebutting the presumptions under Section 139 of the N.I. Act. Moreover, this Court in case of **Shivshankar B. Chaudhary** (*supra*) has also observed that, in absence of documentary proof in respect of the transaction

between the parties for which the disputed cheque was given, it cannot be held that the cheque in dispute was issued for any legally enforceable debt.

7. In the instant case though it was contended by the applicant – complainant that, he alongwith the respondent – accused was looking after business of partnership firm but during the cross-examination he clearly admitted that, the respondent was not his partner but working as an Assistant. He also admitted that, there was no agreement between them in respect of any partnership. Moreover, he has specifically stated in the cross-examination itself that, no details of transaction between himself and the respondent were given in the complaint as well as his affidavit of evidence. Moreover, though the applicant – complainant claimed that, the respondent had purchased the material, food and birds from him and after negotiation the amount of the same was settled to Rs.2,60,799/-, but the applicant did not produce any document or voucher on record to establish that the respondent had purchased any material, food or birds from the complainant and in lieu of that the cheque in dispute was issued. Therefore, in the light of observations of this Court in aforesaid cases it appears that, the

applicant – complainant has failed in proving the fact that the cheque in dispute was issued in discharge of any legally enforceable debt or liability. Thus, considering all these aspects, I am not inclined to grant any leave as claimed by the applicant – complainant. In view of the same, the application stands rejected.

[SANDIPKUMAR C. MORE]
JUDGE