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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.32 OF 2021
WITH
CRIMINAL APPLICATION NO.33 OF 2021**

Manoj Madhukar Kale ... Applicant
Vs.
The State of Maharashtra & Anr. ... Respondents

Mr. Dheeraj D. Patil for the Applicant in both Applications.
Mr. H. J. Dedhia APP for Respondent No.1-State.
Mr. Harshad A. Sathe for Respondent No.2.

CORAM : S. M. MODAK, J.

DATED : 24TH JANUARY 2023

P.C:-

1. Heard learned Advocate Mr.Dheeraj Patil for the Applicant-complainant, learned APP for Respondent No.1-State and learned Advocate Mr. Sathe for Respondent No.2.

2. The Court of 26th Additional Chief Judicial Magistrate, Pune as per two separate judgments dated 28th April 2021, was pleased to acquit Respondent No.2-sole accused for the offence punishable under section 138 of the Negotiable Instruments Act. These are Appeals filed by the complainant. I have heard learned counsel for the parties on granting of special leave to Appeal and also for admission.

3. Summary Criminal Case No.17751 of 2016 and Summary Criminal Case No.5266 of 2015 were filed for not paying amount of

two separate cheques for Rs.5,00,000/- each. The complainant has given evidence whereas the Respondent No.2-accused has also given evidence and examined his brother Deepak as well.

4. Both the parties have offered different versions of the transaction and have pleaded before the learned Magistrate.

Version of the complainant – Manoj

The complainant has advanced loan of Rs.10,00,000/- to accused – Dilip. Rs.5,00,000/- each was advanced in February 2015 and Rs.5,00,000/- in March 2015. As stated above two cheques were issued towards discharge of that liability.

5. This plea is denied by accused – Dilip. His version is :-

- (a) Though he has admitted issuance of cheques, however, the cheques were not issued towards discharge of liability as pleaded by the complainant – Manoj but in fact they were issued by him towards discharge of liability undertaken by his brother Deepak.
- (b) According to him in fact his brother Deepak has borrowed the amount of Rs.6,90,000/- not from the complainant but from his nephew – Akshay.
- (c) Out of that his brother Deepak has repaid Rs.4,00,000/- and the amount of Rs.2,90,000/- was outstanding.

- (d) The reason for issuing these two cheques by accused – Dilip was due to scuffle and at that time his brother Deepak was not having cheques and that's why he issued cheques.
- (e) He relied upon agreement dated 5th September 2015. Its copy was placed before the trial Court.

6. About the agreement :

- (a) Deepak and Akshay are signatories to the said agreement. There is reference of borrowing amount of Rs.6,90,000/- and repayment of Rs.4,00,000/- and outstanding of Rs.2,90,000/-.
- (b) There is reference of three cheques.
- (c) Out of them Rs.5,00,000/- amount was mentioned in two cheques whereas in third cheque, amount is not mentioned.

7. According to Respondent No.2, it is complainant who has misused these two cheques. Respondent No.2-Dilip has also given reply to mandatory notice. It was not placed on record by either side.

8. Both learned Advocates have invited my attention to the evidence given by the complainant – Manoj as well as by accused – Dilip and his brother Deepak. With their assistance, I have also perused the impugned judgments.

9. The trial Court has not accepted the theory of handing over loan for total amount of Rs.10,00,000/- to Respondent No.2-accused-Dilip. There was no document in support of that loan amount and the trial Court also observed how the complainant – Manoj can raise such huge amount. The trial Court also emphasized on the dates of these two cheques. They are of 30th September 2015 and 28th December 2015. The second cheque bears date 28th December 2015 and how it can be when the first cheque was dishonoured on 23rd December 2015. Furthermore, the trial Court observed about non denial of the facts of the complainant which was pleaded in the notice reply by Respondent No.2.

10. The issue before this Court is whether such leave can be granted. For this limited purpose, I have gone through the record and considered contentions raised by the parties. It is true that once signatures are admitted and once issuance of the cheques is admitted, there is presumption in favour of the complainant under section 139 of the Negotiable Instruments Act. It is also true that it is a rebuttal presumption. The accused can adduce evidence to prove contrary. This presumption can be rebutted either by giving evidence or by way of cross examination. Here Respondent No.2-Dilip has given evidence and also examined his brother Deepak. The complainant is aware about the agreement dated 5th September 2015 in between his nephew Akshay and Deepak, brother of the complainant. However, he has denied the contents of the same. It is true that even though there is reference of issuance of cheques by Deepak, the cheque numbers are not mentioned. It is also true that burden of accused is not as heavy as that of the complainant.

11. It is true that the complainant Manoj has not examined any witness or document to show advancing the amount of Rs.10,00,000/-. It is also true that the complainant is denying the transaction in between Deepak and his nephew Akshay. Even he has not examined Akshay. The provisions of section 138 were incorporated in the Negotiable Instruments Act in order enhance reliability of cheque being a negotiable instrument. After considering the evidence and findings, I am of the opinion that at the prima facie stage also the findings cannot be said to be erroneous. I do not find any fault with the findings of the trial Court at the admission stage also, except contending that he has advanced Rs.10,00,000/- to Respondent No.2– Dilip. He has not produced any document. In fact he ought to have adduced evidence to show that Respondent No.2 – Dilip has not issued cheques for Deepak but he has issued cheques in order to discharge his own liability. It has not happened. So I do not think the case for grant of special leave is made out in both the Appeals. Hence, the following order is passed :

ORDER

Special leave to file Appeal sought in both the Applications is not made out and hence, both Applications are dismissed.

(S. M. MODAK, J.)