



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APPA) NO.533/2023

IN

CRIMINAL APPEAL ST.NO.9117/2022

Shri Kamal s/o Liladhar Pasari

..VS..

Laxmi Narayan Shivdayal and anr

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

.....
Shri C.S.Dharmadhikari, Counsel for the Applicant.
Shri S.V.Purohit, Counsel for the Non-applicants.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 31/07/2023

PRONOUNCED ON : 12/09/2023

1. This is an application seeking leave to file an appeal against judgment and order dated 21.5.2022 passed by learned 17th Joint Civil Judge Senior Division and Additional Chief Judicial Magistrate, Nagpur in Summary Case No.2322/2018 whereby non-applicant No.1 is acquitted of offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. Heard learned counsel Shri C.S.Dharmadhikari for the applicant and learned counsel Shri S.V.Purohit for the non-applicants.

3. The applicant (complainant) is the sole proprietor of 'Hari Leela Impex' supplying food grains and grams. Whereas, non-applicant No.1 (the accused) is proprietor of Shivdayal

Industries/non-applicant No.2.

4. The accused used to purchase food grains from the complainant regularly on credit basis. The complainant used to maintain transactions with non-applicant No.2 to show that goods are supplied on credit and payments are made by the non-applicants.

5. Learned counsel for the complainant contended that against transactions of amount Rs.1,00,69,038/-, the accused issued two cheques bearing No.030377 dated 5.9.2017 and 030378 dated 19.9.2017 of Rs.20.00 lacs each were issued. When the said cheques were presented, the same were returned by bank with endorsement 'funds insufficient' and, therefore, the complainant issued legal notices on 7.12.2017 on 11.12.2017. However, as per the mandate, the accused has not paid the amount and, therefore, the complainant filed a criminal complaint against the non-applicants. The trial was conducted and learned Judge of the trial court acquitted the accused by holding that the complainant failed to establish foundational facts for attracting statutory presumption under Sections 118 and 139 and acquitted the accused. As per learned counsel for the complainant, the above said observations are illegal and erroneous and liable to be set aside. The complainant has

arguable points and, therefore, leave requires to be granted to prefer an appeal.

6. It is submitted by learned counsel for the complainant that learned Judge of the trial court has given importance to the fact that the cheques are issued in the name of 'Hari Leela Impes', whereas the complainant runs his business in the name of 'Hari Lila Impex'. In fact, the accused had disputed the invoice bills Exhibits-21 to 30 on the ground that it does not bear TIN Number of the non-applicants and the address mentioned therein is also not in consonance with the transport receipt. He further submitted that learned Judge of the trial court failed to appreciate the settled principles of law that to rebut the presumption, the accused has to bring on record some material which is probable in order to shift the burden on the complainant. He further submitted that the observation of learned Judge of the trial court, that the cheques are issued in the name of 'Hari Leela Impes' and not 'Hari Leela Impex' is erroneous. Learned Judge of the trial court failed to appreciate that the complainant has placed on record invoice challans which show that the goods are transported to the accused. The complainant further placed on record the bank details which show that the complainant is running his business in the name of 'Hari Leela Impex'. In fact, the learned Judge of

the trial court has not considered the presumption which is in favour of the complainant and the said presumption is not rebutted by the accused. On this ground itself, the judgment of the trial court deserves to be set aside. Thus, he submitted that the complainant has various legal points which can be urged before this court and, therefore, leave requires to be granted.

7. *Per contra*, learned counsel for the non-applicants supported the judgment passed by learned Judge of the trial court submitted that learned Judge of the trial court has referred various documents in judgment and held that the complainant failed to establish foundational facts i.e. the transaction between the complainant and the accused. Learned Judge of the trial court has also referred various admissions given by the complainant in the cross examination. Thus, the judgment passed by learned Judge of the Trial court is on the sound footing that the complainant failed to prove the ingredients of the offence and foundational facts.

8. Having heard both the sides and perused the record available, it reveals that the complainant has come with a case that there was business transaction between the complainant and the accused. Out of the said business transaction, the accused issued cheques which returned as dishonoured for

'insufficient funds'. Perusal of the evidence shows that the complainant has adduced oral evidence and reiterated about the the business transaction between them. Admittedly, some admissions are given by the complainant during his cross examination. However, it is to be seen whether the said admissions can be said to be proved as fatal. The accused has not denied that he is the proprietor of the said Shivdayal Industries/non-applicant No.2. The documents on record show that he is proprietor of Shiv Dayal Industries and dealing with trading of food grains. Admittedly, cheques bear the name of 'Hari Leela Impes'. However, there is nothing on record to show that there is another company by name 'Hari Leela Impex' and the accused had transaction with the said 'Hari Leela Impex' but not with 'Hari Leela Impes'. The evidence that is invoice challans shows that the food grains are supplied to the 'Shiv Dayal Industries'. The cheques bear signatures of the accused. The complainant maintained ledger account for the period 1.4.2015 to 31.3.2016 which shows that there was previous transaction between the complainant and the accused and total outstanding amount was Rs.1,00,69,038/- against which the said cheques are issued. The complainant issued notices to the accused after dishonour of the cheques. The said notices were not immediately replied by the accused. The notices are

received by the accused.

9. Thus, considering the entire material on record and taking into consideration the presumption which is in favour of the complainant appears to be not taken into consideration by learned Judge of the trial court, at this stage, whether the judgment and order of acquittal is perverse or not is not required to be seen. The complainant has made out a case to show that there are sufficient grounds on the basis of which he has *prima facie* case to satisfy and arguable points to succeed in the appeal.

10. In this view of the matter, the application is **allowed**. Leave to prefer the appeal is granted.

The criminal application stands disposed of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!