

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO.24 OF 2018

Ajay Ramesh Bhavsar,
Age : 48 years, Occu. : Business,
R/o. Dhadgaon, Tq. Akarani,
Dist. Nandurbar.

... Applicant
(Orig. Complainant)

Versus

Chetan Kalusing Parmar,
Age : 42 years, Occu. : Service,
R/o. Dhadgaon, Tq. Akarani,
Dist. Nandurbar.

... Respondent
(Orig. Accused)

...
Mr. Kunal Kale, Advocate for Applicant.
Mr. Gajendra Jain, Advocate for Respondent sole.
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 22nd JANUARY, 2024

PRONOUNCED ON : 25th JANUARY, 2024

ORDER :

1. Feeling aggrieved by the judgment and order of acquittal passed by learned Judicial Magistrate First Class, Dhadgaon, District Nandurbar, dated 27.06.2012, acquitting respondent from the offence under section 138 of Negotiable Instruments Act, 1881, original complainant is intending to prefer appeal and hence instant leave application.

2. Learned counsel for applicant would submit that, there

was clear transaction between complainant and accused. Accused used to collect amount regularly towards deposit by way of Pigmy agent. Account was also said to be opened in the name of son of complainant. However, when there was need, complainant went to withdraw the amount, but the account was closed and there was no amount in the said account. Learned counsel submitted that, complaint was also lodged to Co-operative department. Towards repayment accused had also issued cheque, but it was dishonoured and therefore, proceedings were initiated, but learned trial Judge misconstrued the legal provisions, failed to consider the evidence in its proper perspective and acquitted the accused. That, there is a good case on merits in appeal and hence he seeks leave.

3. Per contra, learned counsel for respondent would submit that, there was no legally enforceable debt. Complainant failed to establish that cheque was issued towards legally enforceable debt and therefore, learned trial Judge rightly acquitted accused, hence he prays to refuse the leave sought by complainant.

4. On hearing both sides and on going through the papers, it seems that accused was a Pigmy agent and on his approach complainant opened daily savings account in the name of his son.

Case set up that minimum Rs.100/- were handed over by accused daily and thereby total amount of Rs.1,13,000/- were handed over to accused upto 2005. That, as complainant was in need, he went to operate the account in '*Nandurbar Zilha Sarkari Nokranchi Sahakari Bank Ltd.*', but he realized that there was no balance and the account was closed. According to complainant, the inquiry revealed that, without his permission accused had withdrawn and closed the account by forging signatures. Complaint to that regard lodged with Co-operative department. That, thereafter accused issued cheque, but it was dishonoured. Hence the proceedings.

5. Case set up by respondent is of denial any financial transaction or issuance of cheque towards legally enforceable debt.

6. Considering the nature of proceedings, primary burden is on the complainant to establish that there was transaction between complainant and accused and he owed amount towards accused and towards legally enforceable debt, instrument was drawn. *Prima facie* it appears that, there are no written documents except one passbook, however the said passbook (Exh.36) does not bear number, date or signature of accused and there is admission to that extent in cross. Resultantly, when complainant failed to establish money transaction, issue of repayment or existence of

legally enforceable debt crops up. If there is allegation of misappropriation, there is a distinct remedy. Proceedings cannot be initiated under section 138 N.I. Act, unless it is demonstrated that there was financial transaction and cheque in question was issued towards its repayment. Consequently, case to that extent not being made out, no fault can be found in the findings of learned trial court that no offence of 138 of N.I. Act being made out, accused deserves to be acquitted.

7. Findings no merit in the application in the light of above discussion, prayers raised herein cannot be granted.

8. The application stands rejected.

(ABHAY S. WAGHWASE, J.)