



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO. 38 OF 2019

Ashish Dnyandeo Gaikwad,
Age : 27 years, Occu. : Business,
R/o. Plot No. 5-C, Vaishali Nagar,
Jaswantpura, Aurangabad,
Tq. & Dist. Aurangabad.

... Applicant
(orig. Complainant)

Versus

Shantaram Januji Awachar,
Age : 40 years, Occu. : Business,
R/o. : Plot No. 135, Pethe Nagar,
Bhausingpura, Aurangabad,
Tq. & Dist. Aurangabad.

... Respondent

...

Mr. Madan S. Kokate, Advocate for Applicant
Mr. Aniket S. Avhad h/f. Mr. M. S. Karad, Advocate for Respondent

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 15 FEBRUARY 2024

PRONOUNCED ON : 21 FEBRUARY 2024

ORDER :

1. Dissatisfied by the judgment and order of Judicial Magistrate First Class, Court No. 24, Aurangabad dated 31.12.2018, acquitting respondent - original accused from offence punishable under section 138 of Negotiable Instruments Act, 1988, original complainant is hereby seeking leave to file appeal.

2. In support of relief, it is submitted that, due to long

acquaintance, complainant had extended hand loan of Rs.1,00,000/- to accused. Accused has agreed to repay in two months. On persistent demand, accused issued cheque, but it was dishonoured and when amount was not paid in spite of statutory notice, complaint was filed. It is further submitted that, cheque and signature has not been disputed by accused. However, learned trial Court has erred in holding that complainant did not discharge initial burden. That, there was no evidence about funds with complainant to extend advance loan. Such findings are erroneous. That, there is good case on merits in appeal and hence he seeks leave.

3. In answer to above, learned counsel for accused would submit that, at the threshold complainant failed to establish legally enforceable debt. Transaction of hand loan was not proved and therefore learned trial court rightly dismissed the complaint.

4. In the light of above submissions, documents placed on record are taken into consideration. It seems that S.C.C. No.3356 of 2017 was filed against present respondent by making averments in the complaint that due to friendly relations and as accused was need of money, on request of hand loan of Rs.1,00,000/- was given. Towards repayment accused issued cheque, but it was

dishonoured. In support of above case, apart from cheque, bank memo and copy of legal notice, complainant has adduced his own evidence.

5. *Prima facie* it seems that, accused has not disputed issuance of cheque. He seems to have questioned the alleged purpose of hand loan. He has denied any liability by taking defence he is mere friend of father of complainant and that he received amount from father of complainant for an assignment Gym subsidy proposal. Therefore, in the considered opinion of this court, with specific defence to that extent taken by accused, it was burden upon accused to establish his said assertions. When issuance of cheque and signature is not disputed, *prima facie* presumption is in favour of complainant. No distinct evidence seems to have been adduced by accused to rebut presumption i.e. in support of specific case of money being taken from father of complainant and not complainant. Therefore, learned trial court does not seem to have properly appreciated above aspect. Therefore, there is a debatable issue and arguable case and the same needs to be dealt upon full-fledged appeal. Hence leave deserves to be granted. Accordingly, I proceed to pass the following order : -

ORDER

- (i) Application stands allowed.

- (ii) Leave is granted to file Appeal.
- (iii) Registry to register the Appeal.
- (iv) Appeal stands **admitted**.
- (v) Call record and proceedings.

(ABHAY S. WAGHWASE, J.)