



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY
NO. 68 OF 2019**

Baban S/o. Krishnaji Thorat
Age: 64 years, Occu.: Agri. & Business,
R/o. Therwadi, Tq.Karjat,
Dist.Ahmednagar.

....Applicant
(Orig. Complainant)

Versus

Manoj Mohan Thorat
Age: 34 years, Occu.: Agri & Business,
R/o. Therwadi, Tq.Karjat,
Dist.Ahmednagar.

.....Respondent
(Orig. Accused)

.....
Advocate for Applicant : Mr.Amol K. Gawali
Advocate for Respondent : Mr. V.P. Latange
.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 01 APRIL, 2024

PRONOUNCED ON : 04 APRIL, 2024

ORDER :

1. Original complainant prays for leave to file appeal on account of acquittal of present respondent from offence under Section 138 of the Negotiable Instruments Act (NI Act) vide judgment and order dated 07-01-2019 passed by the learned Judicial Magistrate First Class, Karjat, Dist.Ahmednagar.

2. Learned Counsel for applicant points out that complainant is running Agro based society and is primarily involved in collecting milk from agriculturist. It is pointed out that apart from it, complainant also extends financial help to purchase live stock to those who are desirous of conducting milk business and money so lent is deducted from the milk supplied by the borrower. That accused, who runs a grocery shop, had approached complainant for loan to the tune of Rs.3,50,000/- for purchasing Jersey cows. It is further pointed out that his demand was complied in presence of two witnesses. Assuring of repayment of loan within two months, accused issued cheque dated 29-09-2014, but accused did not purchase cow. It is pointed out that said cheque given by accused was presented in the bank for realization, but it was dishonoured and hence, complaint was filed. It is further pointed out that inspite of legal notice, when accused failed to repay cheque amount, above proceedings were instituted.

According to learned counsel for applicant all necessary ingredients for attracting offence under Section 138 of the NI Act are available. Learned trial Court also drew opinion that initial presumption is available under Sections 118 and 139 of the NI Act.

3. It is pointed out that accused failed to adduce any evidence still learned trial Court held that accused probalilized his defence. Issuance of cheque and signature has not been denied and in view recent settled legal position, learned trial Court ought not to have acquitted the accused. There is apparently improper appreciation of evidence as well as law and hence, complainant seeks permission to question the impugned judgment and for all above reasons, he prays to grant leave.

4. According to learned Counsel for respondent, cross-examination of complainant has demolished his own case. There are vital admissions. Essential ingredients for attracting offence under Section 138 are patently missing and therefore, learned trial Court correctly acquitted accused and hence he prays to refuse leave.

5. Heard both sides. Perused the complaint, evidence as well as documents on record.

6. Summary Criminal Case No.68 of 2015 is instituted by present applicant and the gist of the complaint is that complainant extended loan to the tune of Rs.3,50,000/- to the accused on demand i.e. for purchase of live stock and accused assured to repay the said loan

within two months and also handed over post dated cheque to the complainant. According to complainant, accused did not purchase live stock conveying his decision to purchase live stock having been called off and further asked complainant to deposit the cheque issued earlier, but on its presentation it was dishonoured and hence, subsequent legal steps were taken.

In trial Court, defence of accused is of total denial and about misuse of blank cheque, which might have been taken by complainant from the shop of accused.

7. During trial, complainant adduced his own evidence at exh.14 alongwith evidence of one Jivan Arjun Kamble at exh.29. Accused did not step into witness box nor any distinct evidence led from his side.

8. It is fairly settled that fundamental burden of existence of essential ingredients of Section 138 of the NI Act and existence of legally enforceable debt is upon the complainant. It is further settled position that if initial presumption under Sections 118 and 139 is drawn, then burden is on accused to rebut the same. But for rebutting the same, it is open for accused to criticize the evidence and circumstance put forth by complainant and he need not adduce

evidence distinctly to rebut the presumption.

9. Keeping above legal requirements in mind, if case in hand is *prima facie* tested, very cross-examination of complainant shows that he is unable to satisfy from where he raised the amount. According to him, he has income from the sale of pomegranate, cloth as well as Dairy, but there is no distinct evidence in that regard. Moreover, different stand is taken subsequently about withdrawing amount from bank and even there is no documentary evidence regarding such withdrawal. Moreover, such withdrawal is much prior to alleged demand by accused dated 14-09-2014.

10. Further the document exh.28 allegedly issued after extension of loan, is doubtful as distinct inks are appearing regarding contents and cheque number regarding which while questioned in cross-examination, complainant could not offer satisfactory explanation. As pointed out by learned Counsel for accused loan receipt Exh.28 also *prima facie* alleged to be prepared on 14-09-2014 i.e. on the date of alleged demand and extension of loan, however, details of the cheque allegedly handed over by accused on that day are not reflected therein.

11. Therefore, *prima facie* complainant's case does not inspire confidence. His own cross-examination has weakened his own case. There is nothing convincing on behalf of applicant to find fault in the appreciation of evidence and how learned trial Court erred. Further no good ground is made out to grant leave.

Consequently, it does not seem to be a fit case to grant leave as prayed. Accordingly, I proceed to pass following order :

ORDER

The application stands rejected.

(ABHAY S. WAGHWASE)
JUDGE