



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

**APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY
NO. 49 OF 2022**

Najroddin S/o. Yusufoddin Faroqui
Age: 63 years, Occu.: Agri. & Business,
R/o. Mali Galli, Kalamnuri, Tq.Kalamnuri,
Dist.Hingoli.

..Applicant
(Orig. Complainant)

Versus

Balaprasad S/o Shivprasad Darak
Age: 61 years, Occu.: Agri. & Business,
R/o. Marwad Galli, Kalamnuri,
Tq.Kalamnuri, Dist.Hingoli.

..Respondent

...

Advocate for Applicant : Mr. Hamzakhan I. Pathan
APP for Respondent : Mr. R.K. Ingole (absent)

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 11 JANUARY, 2024

PRONOUNCED ON : 16 JANUARY, 2024

ORDER :

1. Learned Counsel for original complainant would submit that he had instituted proceedings under section 138 the Negotiable Instruments Act (NI Act). There was sale transaction between the parties, part payment was made, cheques were signed and issued towards consideration. Therefore, all necessary ingredients and

requirements were available on record, but when cheque was put to for realization, it was dishonoured under remark of "insufficient funds. Therefore, legal notice was sent and same was received. However, stand taken by accused is that less land was transacted. That learned trial Judge on one hand accepted the case of complainant but further held that offence under section 138 is not made out. The reason assigned by learned trial Judge is that complaint ought to have been filed by wife of accused and not by complainant. That infact learned trial Court failed to consider that the transaction was with complainant and cheques were handed over towards legal liability. Therefore, as there is erroneous appreciation of evidence, he seeks leave to file appeal.

2. On considering the submissions advanced and on going through the impugned judgment, it seems that there was transaction of land between complainant and accused dated 29-01-2019 and towards price of land, accused seems to have issued two cheques of Rs.1,50,000/- each; one cheque was honoured but other was dishonoured, therefore, proceedings under the NI Act was instituted.

3. *Prima facie*, on going through the observations of the learned trial Court in paragraph no.8, it appears that the learned trial Judge

has entered into the aspect of failure to mention all facts correctly like not mentioning consideration fixed, how much was the earnest amount and how much amount was adjusted towards earlier payment. Observations in paragraph no.11 are apparently based on assumptions and presumptions. Apparently out of two cheques issued by accused, one was honoured but other was dishonoured and therefore, steps required under Section 138 of the NI Act seems to have been taken.

4. Record shows that instant application for leave to appeal was instituted on 18-04-2022. Though there is appearance of Mr.R.K.Ingole, learned Advocate, he is not appearing and answering the application. Matter has appeared on board on 17-10-2023, 31-10-2023, 05-12-2023, 04-01-2024 and 11-01-2024, but none appears on behalf of respondent. Therefore, there is reason to hold that he is not keen in answering the application. Matter cannot be kept on adjourning for no reason. Therefore, matter is taken up for order in his absence.

5. Considering the above submissions of learned Counsel for applicant and the impugned judgment, there are contentious issues which need to be re-analyzed and re-appreciated. Grounds too exist

for hearing the appeal and hence, I proceed to pass following order :

ORDER

- I. The 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)
JUDGE