2024:BHC-AUG:10158

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO. 50 OF 2022

Kamlakar Anant Samant,
Age : 61 years, Occu. : Business,
R/o. Anantashram, Hirapur Road,
Chalisgaon, Dist. Jalgaon. **... Applicant**
(Orig. Complainant)

Versus

Gulab Mohan Patil,
Age : 55 years, Occu. : Business,
R/o. At Post Wakadi,
Tq. Nandgaon, Dist. Nashik **... Respondent**
(Orig. Accused)

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Mr. Siddhartha B. Yawalkar, Advocate for Applicant.
Mr. Rahul B. Temak, Advocate for Respondent.

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CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 19th APRIL, 2024
PRONOUNCED ON : 10th MAY, 2024

ORDER :

1. Original complainant, who instituted proceedings under section 138 of Negotiable Instruments Act, is intending to challenge the judgment and order of acquittal passed by learned Judicial Magistrate First Class, (Court No.3), Chalisgaon, District Jalgaon, dated 12.01.2022 passed in S.C.C. No.711 of 2010.

2. Learned counsel for applicant submitted that, there was hand loan transaction. Out of cordial relations and long acquaintance, loan to the tune of Rs.15,00,000/- was extended to

the accused, who assured to repay it in a month. Accused issued promissory note (*Usanwar Pawati)* and the same was placed on record. According to learned counsel, issuance of cheque, signature over it and acknowledging promissory note were not disputed in the trial court. Therefore, complainant's case was virtually proved. According to him, learned trial court still acquitted the accused, holding that, complainant is not holder of instrument in due course. According to him, learned trial court has also questioned the legally enforceable debt. It is pointed out that, in fact, complainant is a partner of a firm. Merely not filing complaint in the name of firm, would not be itself a good ground to question the transaction. It is pointed out that bank official has also been examined. In support of transaction carried out in the name of firm, learned counsel pointed out that, all such crucial aspects are not appreciated by learned trial Judge. Therefore, there is a good case on merits in appeal and hence he seeks leave.

3. In support of his submissions, learned counsel for applicant places reliance on following decisions :-

i] *Principal Commissioner v. Cadila Healthcare Limited, AIROnline 2022 GUJ 1416;*

ii] *Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries AIR 1985 SC 278;*

iii] Sanjay Sreesha v. Serious Fraud Investigation Office Ministry of Corporate Affairs, New Delhi, AIROnline 2022 Kar 3001.

4. In answer to above, learned counsel for respondent accused pointed out that, very transaction alleged by complainant has come under shadow of doubt. It is pointed out that, though there was cheque, it was towards distinct transaction of supply of labour. That, there was no hand loan as alleged. Moreover, it is pointed out that, there is a legal issue. He specifically pointed out that, though, cheque is issued in the name of firm, complaint is apparently filed in individual capacity. For all above reasons, it is submitted that, complaint failed to attract the provisions of 138 of N.I. Act and so learned trial court committed no error in acquitting the accused. Hence, he prays to refuse leave.

5. After considering the submissions of both sides and on going through papers, it seems that, S.C.C. No. 711 of 2010 was filed in the name of Kamlakar Anand Samant i.e. complainant. The sum and substance of his complaint is that, he is a partner of a firm namely, 'Shwet Sarita Farm Product'. Because of friendly relations with accused, on demand, complainant handed over Rs.15,00,000/- as a hand loan. Towards repayment of the said loan, complainant put up a case that, accused issued two cheques amount of

Rs.10,00,000/- and Rs.5,00,000/- respectively, but the same were dishonoured. In spite of legal notice, accused failed to give the cheque amount and hence the proceedings.

6. Defence of accused is that, there was no borrowing of loan as alleged at all. It is his case that blank cheques were issued to Sangli Sugar Factory, which is owned by complainant in a distinct transaction and that too as a security, but same being misused. It is also his defence that, there is no legally enforceable debt at his end. He also denied receipt of legal notice.

7. In cases of such nature, at the outset, it is incumbent upon complainant to establish very legally enforceable debt or liability. Exact transaction has to be demonstrated and established by adducing legally acceptable evidence. Here, precise case of complainant is that, on demand, out of friendly relations, he gave Rs.15,00,000/- on 28.09.2009. Accused issued *"Usanwar Pawati".* Accused issued cheque (Exh.40) and the same was dishonoured.

8. As pointed out that, it is emerging that, in complaint it is averred that, on 28.09.2009 in the office of Notary, he gave loan to the tune of Rs.15,00,000/- and accused issued promissory note (Exh.44). But, at the same time, complainant seems to have also

came with a case that he gave a loan to accused by issuing two cheques i.e. of Rs.10,00,000/- bearing No.524972 dated 26.09.2009 and another cheque of Rs.5,00,000/- bearing no. 524974 dated 29.09.2009. Such split up is not stated in the substantive evidence. The dates of handing over of loan and the mode of extending loan are found to be inconsistent.

9. As pointed out and it is also emerging from complaint that, proceedings are instituted in the individual capacity. Passing reference is made about he too be a partner of firm by name “Shwet Sarita Farm Product”. Cheque in question is also issued in the name of said firm. Complaint is obscure as to whether so called loan was extended from firm’s account or from individual account. Specific case is that, there is extension of friendly loan, but cheque are in firm’s name. Such things do not go in hand in hand. Such aspect also creates doubt about the very aspect of extension of friendly loan and further existence of legally enforceable debt.

10. Resultantly, in the light of above discussion, apparently very transaction of extension of loan is not cogently proved. No legally enforceable debt is shown to be existing at the time of handing over cheque to attract the rigors of section 138 of N.I. Act

Learned counsel for applicant relied on above rulings, however, with due respect, facts in those cases cannot be equated here being distinct.

No good ground being made out to grant leave to file appeal nor any illegality or perversity is brought to the notice in the appreciation at the hands of learned trial court, relief as prayed cannot be granted. Hence, the following order :-

ORDER

Leave refused. Application is rejected.

(ABHAY S. WAGHWASE, J.)

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