



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY NO. 94 OF 2023

Sanjay s/o Kisanrao Lashkare
Age – 47 years, Occupation – Business,
R/o. Samta Nagar, Osmanabad
Taluka and District Osmanabad.

... Applicant
[original complainant]

versus

Devidas s/o Kerba Sonawane
Age – 52 years, Occupation – Service,
R/o. Manager Quarter, Near Ajintha Building,
Near Subhedari Rest House, Aurangabad,
Taluka and District Aurangabad.

... Respondent
[original accused]

.....

Ms. Sheetal V. Salunke, Advocate for the Applicant.
Ms. Pratibha R. Jamdhade, Advocate h/d Ms. Maya Jamdhade,
Advocate for the Respondent.

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 18.01.2024

Pronounced on : 23.01.2024

ORDER :

1. Instant application is for leave to question the judgment and order of acquittal passed by learned JMFC, Osmanabad in SCC No. 670/2016 dated 16.01.2023 acquitting respondent from charge under Section 138 of the Negotiable Instruments Act, 1881.

2. In support of relief, learned counsel for the applicant would submit that there are long standing relations between the parties.

There were several transactions between them and towards a legal liability, cheque was issued i.e. towards the amount which was borrowed by respondent for his daughter's marriage. It is submitted that issuance of cheque and signature over it has not been disputed and therefore statutory presumption was available. However, according to her, learned trial court has acquitted respondent only on the ground that there was no financial capacity with the complainant, who was running betel shop, to lend the amount and that, his source of income has not been established. It is further submitted that there were several earlier transactions and there is admission to that extent. Therefore it is submitted that there is total non-appreciation of evidence and so, there being a good case in appeal, she seeks leave.

3. Learned counsel for the respondent pointed out that defence has been taken about misuse of blank cheque. Secondly, it is pointed out that on the date of alleged transaction of hand loan, respondent was at Mumbai and therefore there is no question of seeking any hand loan. That, there was documentary evidence to that extent and thereby accused has rebutted the presumption. Thus, it is submitted that no fault can be found in the findings of the trial court and so leave is sought to be dismissed.

4. After considering the above submissions and on going through the papers, it appears that present applicant had instituted proceedings under Section 138 of the Negotiable Instruments Act, 1881 alleging that he had friendly relations with accused. That, on 29.01.2015 hand loan was obtained by respondent-accused for marriage of his daughter and for satisfying personal difficulties. That, complainant paid Rs.2,60,000/- to the accused in presence of Bhimrao Kamsheti. Towards its repayment, accused issued cheque but it was dishonoured and therefore after notice, proceedings under the Negotiable Instruments Act, 1881 were instituted. It seems that in support of his case in trial court, applicant-complainant has placed on record original cheque, cheque return memo, copy of notice and postal acknowledgment.

5. As required, complainant is liable to establish his case. Acquaintance between parties has not been primarily disputed. Specific case of complainant is that, hand loan was demanded and it was extended on 29.01.2015. Specific defence taken is that, firstly, complainant had no financial capacity to extend such loan and secondly, on the date of alleged transaction, accused was out of station and there was no such transaction at all. Complainant seems to be running a pan shop. Complainant has not adduced any proof of

his regular income so as to extend alleged loan. Moreover, it seems that by examining witness, namely, Ravi Wahul, accused has brought on record that he was working as a driver on the Government vehicle i.e. in PWD department and by way of document Exhibit 42, it is shown that accused had departed on 29.01.2015 and had arrived on 31.01.2015. Therefore such document belied the contention of complainant and his witness about hand loan on 29.01.2015.

6. Therefore, *prima facie* there is doubt about handing over hand loan to the tune of Rs.2,60,000/-. In cases of such nature, accused is entitled to rebut the presumption by probabilizing his defence. He seems to have succeeded to that extent in view of Exhibit 42. Doubt also crops up regarding capacity of complainant to raise the alleged amount, more particularly in view of the business which he conducts. Therefore, as no case was made out, learned trial court rightly acquitted the accused. No case being made out before this court for grant of relief, the application is dismissed.

[ABHAY S. WAGHWASE, J.]