



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

**APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY
NO. 81 OF 2023**

- . Mahesh Nagari Sahakari Patsanstha,
Sangamner,
Tq.Sangamner, Dist.Ahmednagar,
Through its Recovery Officer,
Dattatraya Machindra Nichal
Age: 38 years, Occu.: Recovery Officer,
R/o. Ashok Chowk, Mahesh Nagari
Sahakari Pat-sanstha, Sangamner.Applicant

Versus

1. Ashish Subhash Varma
Age: 44 years, Occu.: Business,
R/o. Vakil Colony, Near Abhang Mala,
Sangamner, Tq.Sangamner,
Dist.Ahmedngar.
2. State of MaharashtraRespondents

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Advocate for Applicant : Mr. Mehul Vikas Navandar
APP for Respondent no.2 : Mr.S.M.Ganachari

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CORAM : ABHAY S. WAGHWASE, J.

**RESERVED ON : 11 JANUARY, 2024
PRONOUNCED ON : 19 JANUARY, 2024**

ORDER :

1. Aggrieved by the judgment and order of acquittal passed by learned JMFC (Court No.3), Sangamner, dated 28-04-2023 in S.C.C. No.838 of 2019, applicant is seeking leave to file appeal.

2. Learned Counsel for applicant would submit that proceedings under Section 138 of the Negotiable Instruments Act (for short “the NI Act”) was instituted by applicant against present respondent no.1, who is a member of Pat-sanstha. That loan to the tune of Rs.3,00,000/- was obtained by respondent no.1 by accepting all the terms and conditions and he was thereby required to repay the loan alongwith interest in installments. Respondent no.1 has paid Rs.2,55,632/- to the applicant till 24.03.2015. However, it is alleged that respondent no.1 has issued a cheque of Rs.2,61,000/- dated 30-04-2019 towards balance loan amount and interest amount for clearance of the loan, but the said cheque was returned with the remark “No such account” and therefore, after serving notice, when respondent no.1 failed to repay the cheque amount, complaint bearing S.C.C. No.838 of 2019 was instituted .

3. Learned Counsel for the applicant pointed out that all legal requirements for attracting offence under Section 138 of the NI Act are available in the evidence. However, still even when there was legally enforceable debt, learned trial Court erred in holding that there was no issuance of cheque towards legally enforceable debt. That the learned trial Court held that respondent no.1 had paid

Rs.2,55,632/- to applicant and thereby had cleared dues alongwith interest. However, learned trial Court has failed to appreciate the fact that respondent no.1 has to repay total loan amount alongwith interest.

4. In support of above contention, loan statement is also placed on record under the head of “Customer Ledger” in respect of present respondent no.1, which is already marked as exh.58 in the trial Court. Now, arguments are raised by applicant / complainant that such statement has not been properly appreciated by the learned trial Court.

5. The instant application has been instituted on 09-06-2023. Inspite of matter appearing on board five times i.e. on 26-09-2023, 17-10-2023, 26-10-2023, 30-11-2023, 04-01-2024, and though the matter being adjourned for submissions of respondent no.1, who is admittedly served on 12-09-2023, none appears to answer the application. On 04-01-2024, as respondent no.1 was absent, matter was adjourned by way of last chance. Today also none appears and therefore, matter is taken up for hearing and order.

6. After hearing the submissions of learned Counsel for applicant

and on going through the judgment under challenge, it transpires that learned trial Court in its order dated 28-04-2023, after discussing the respective cases put-forth during argument, has observed in paragraph nos.9 and 10 of the impugned judgment that presumption under Section 118 of the Act has remained unrebutted at the end of accused. That contention of the accused that he did not issue disputed cheque is also rejected by the learned trial Court in paragraph no.11 of its judgment. However, complaint seems to have been dismissed primarily on the basis of cross-examination of C.W.-1 Dattatraya Nichal, wherein there are certain admission that on 03-05-2019 an amount of Rs.2,55,632/- has been paid by the accused. Considering such material, learned trial Judge seems to have observed that on such admission of witness, it cannot be denied that there is absolutely no transaction between accused and complainant. However, considering admission of witness about receipt of Rs.2,55,632/-, learned trial Judge seems to have recorded a finding that there are no dues and that issuance of notice demanding Rs.2,61,000/- is also creating doubt.

7. Before this Court, learned Counsel for the applicant has placed on record copy of "Customer Ledger" and it is pointed out that there

is no receipt of said amount of Rs.2,55,632/-.

8. Therefore, in the light of above material, *prima facie*, there are grounds to be agitated in appeal. In spite of drawing presumption under Section 118 of the NI Act, learned trial Judge has acquitted the accused. Hence, case is made out for filing appeal and so leave deserves to be granted as prayed.

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