



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

**APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY
NO. 84 OF 2023**

Shivaji Sandu Ukirde
Age: 53 years, Occu.: Agri. & Business,
R/o.Karmad,Tq.Aurangabad,
Dist.Aurangabad.

....Applicant
(Original Complainant)

Versus

Shaikh Yunus Shaikh Habib
Age: 55 years, Occu.: Business,
R/o. At Post Murumkheda, Tq.Aurangabad,
Dist.Aurangabad.

.....Respondent
(Original Accused)

.....
Advocate for Applicant : Mr.Kamlakar J. Suryawanshi
Advocate for Respondent : Mr. Arjun Raosaheb Lukhe

.....
CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 01 APRIL, 2024

PRONOUNCED ON : 08 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 15-05-2023 passed by learned Additional Chief Judicial Magistrate, Court No.4, Aurangabad.

2. According to learned counsel for applicant, applicant / complainant is in business of selling cotton to accused, which was procured by him from various persons. Because of said business relations, there was good acquaintance between accused and complainant. Learned Counsel submitted that because of financial needs, accused approached complainant on 01-03-2015 for hand-loan to the tune of Rs.8,80,000/-. That out of good relations, complainant raised the amount and gave it to accused in cash. It is pointed out that accused assured to repay it in three months. That only on persistent and consistent demand, accused issued cheque, but the same was dishonoured and therefore, after taking legal steps, proceedings under Sections 138 was instituted. Learned counsel pointed out that apart from his own evidence, complainant adduced evidence of CW2 Dwarkadas Ramdas Vidhate, Branch Manager, CW3 Balasaheb Hanumant Saste, Tax Consultant and further established all necessary ingredients to attract the offence, however, learned trial Court acquitted accused, who had no good defence and there was no rebuttal of complainant's evidence in any form. According to learned Counsel, learned trial Court has unnecessarily dealt issue of source of complainant to raise amount. There being improper appreciation of evidence while according acquittal, complainant intends to question

the same by filing appeal and hence, he seeks leave.

In support of above, he seeks reliance on *Shri Vithal Tulshidas Zalmi v. Shri Baswaraj Kedarji @ Anr.*, 2013 ALL M.R. (Cri.) 4147; *VPK Urban Co-operative Credit Society Limited v. Mrs. Nandini Shankar Waingade & Anr.*, 2013 ALL M.R. (Cri.) 1204; *M/s. Sai Auto Agencies v. Sheikh Yusuf Sheikh Umar*, 2010 All M.R. (Cri.) 1204; *P Venugopal v. Madan P. Sarathi*, 2009 All M.R. (Cri.) 915; *Kalamani Tex and Another v. P. Balasubramanian*, 2021 DGLS (SC) 63 and *Rahul Sudhakar Anantwar v. Shivkumar Kanhiyalal Shrivastav*, 2019 DGLS (SC) 1430.

3. In answer to above, learned Counsel for respondent / accused submits that firstly there was no hand-loan to the tune of Rs.8,80,000/-, secondly, he never issued cheque as claimed towards any legally enforceable debt. It is pointed out that accused had purchased cotton worth Rs.1,50,000/- and price towards it was already paid in presence of DW1 Syed Sarvar Syed Noor. In said business, cheque, which was issued, has not been returned by complainant and is probably misused. Learned counsel for accused also questioned the contents of the cheque to be in his writing.

4. In the light of above case and counter case, perused the papers

as well as judgment of the trial Court. Sum and substance of complaint is that out of financial need, considering long standing business relations, complainant gave hand-loan of Rs.8,80,000/- to the accused and towards its repayment, cheque was issued but same was dishonoured, hence, the proceedings.

5. In support of above case, apart from his own evidence, complainant seems to have adduced evidence of CW2 Dwarkadas Ramdas Vidhate, Branch Manager and CW3 Balasaheb Hanumant Saste, Tax Consultant. Bank statement exh.50 and copies of IT returns exh.54 to 56 are also produced on record. Even learned trial Court in paragraph 22 of the impugned judgment discussed to above extent and has observed that from the evidence on record i.e. bank statement exh.51, It returns exh.54 to 56, complainant has shown that he is capable of arranging Rs.3,35,000/-. However, it seems that as regards to raising Rs.5,45,000/- from market, there is no proper explanation as to from whom and when exactly said amount was raised. Further according to complainant, he gave amount of Rs.8,80,000/- in cash, but surprisingly no reciprocal document of acknowledgment and assurance to repay is obtained by complainant. Even his case is that he paid the above amount in installments during

the period from 01-03-2015 to 17-03-2015. Even details as to on which date how much amount was paid in installment are not substantiated orally or in documentary form and therefore, in absence of foundation, mere averment of extending cash hand-loan of Rs.8,80,000/- itself is not sufficient to accept the case of complainant straightaway.

Furthermore, accused has denied taking any hand-loan and has come up with a case of sole transaction of purchase of cotton to the tune of Rs.1,50,000/- and payment towards it being made and he has also adduced evidence of DW1 Syed Sarvar Syed Noor at exh.62. In said transaction of purchase of cotton, defence put up is that security cheque was issued and it was not returned back by complainant. So much part of defence has not been rendered doubtful by complainant in trial Court.

6. Therefore, apparently case of complainant in trial Court is weak. Merely out of business relations, huge amount is allegedly lent by way of hand-loan without taking reciprocal acknowledgement or examining independent witness. Even there is failure to satisfy about raising of huge amount to the tune of Rs.5,45,000/-. Hence, with such evidence and when very legally enforceable debt at the end of

accused is not demonstrated by adducing cogent and reliable evidence, offence under Section 138 of the NI Act cannot be said to be made out.

7. I have gone through the numerous rulings relied by the learned Counsel for applicant. Said rulings are on the settled legal position regarding which there is no dispute. Moreover, facts in those cases and the case in hand being distinct, said rulings cannot be taken aid of to grant relief as prayed. No good ground is made out to grant leave. How learned trial Court failed to appreciate evidence on record is also not satisfactorily shown. No case being made out to grant leave, following order is passed :

ORDER

The application stands rejected.

(ABHAY S. WAGHWASE)
JUDGE