IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY NO. 98 OF 2023

Baswaprabhu Trading Co.,
Commission Agent Shop No. 70/C,
Market Yard, Latur.
Through its Prop. Satish Panchappa Gungune,
Age – 69 yrs., Occu. - Business,
R/o Latur. … Applicant
[Orig. Complainant]

Versus

Durga & Ravaleshwar Dal Mill,
Old MIDC G-34, Latur,
Prop. Bharat Baburao Ronge,
Age – Major, Occu. Business,
R/o. Old MIDC G-34, Latur. … Respondent
[Orig Accused]

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Mr. A. K. Bhosale h/f Mr. S. P. Urgunde, Advocate for the Applicant.
Mr. V. P. Sawant h/f Mr. A. T. Jagtap, Advocate for Respondent-sole.

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 31.01.2024
Pronounced on : 07.02.2024

ORDER :

1. On account of acquittal of respondent from offence under Section 138 of the Negotiable Instruments Act, 1881 [NI Act], original complainant is seeking leave to file appeal against judgment and order dated 04.05.2023 passed by learned JMFC, Latur in SCC No. 242 of 2013.

2. Learned counsel for the applicant submits that transaction has been proved between complainant and accused regarding credits. Accused issued cheque dated 27.09.2012 towards legally enforceable debt but the cheque was dishonoured. Learned counsel submits that accused had admitted issuance of cheque but sole defence taken was of cheque handed over as security. That, accused has admitted about sale of pulses (*toor dal*) by complainant to the accused and therefore accused was bound to repay the amount towards it and only for the discharge of liability, cheque was issued. However, learned trial court has, in spite of drawing initial presumption, acquitted the accused on the ground that there was no legally enforceable debt. That, applicant has a good case on merits as there is total non appreciation of oral and documentary evidence and hence he seeks leave.

3. In response to the above, learned counsel for the respondent submits that there was no legally enforceable debt. Complainant was duty bound to first establish legally enforceable debt but he failed to do so. That, moreover, it was revealed during trial and also admitted by complainant that contents of the instrument were not written by accused. Therefore, case of complainant has come under shadow of doubt. That, defence witness has been examined and thereby presumption has been successfully rebutted. Therefore, according to

him, learned trial court committed no error and so he prays to dismiss the leave application.

4. After considering the submissions of both sides, it seems that complainant is a proprietor of a trading company and accused is in the business of Dal Milll. Complainant came with a case that accused purchased *toor dal* and its delivery was made at the warehouse of accused. Cheque towards repayment of Rs.6,08,770/- drawn on Bank of Maharashtra was issued but on its presentation, it was returned with remark “account closed” and therefore, after notice, when payment of amount over cheque was not made, complaint seems to have been lodged.

5. In support of his case, complainant seems to have adduced his own evidence as CW1 at Exhibit 21 and also examined a bank official as CW2 at Exhibit 51.

6. Setting up a defence of total denial, accused seems to have disputed the cheque to be towards legally enforceable debt. His specific defence is that he had taken hand loan from complainant in presence of one Shivaji Dapke and at that time cheque was taken by complainant by way of security and the same has been misused.

7. It seems that considering the respective cases of both sides, learned trial Judge has held that there is no denial of signature over the cheque and therefore point no.1, regarding issuance of cheque in question, was answered in affirmative. Similarly, learned trial court also held that accused failed to repay the cheque amount in spite of receipt of legal notice and resultantly, point no. 2, regarding establishing precondition under Section 138 of the NI Act being found fulfilled, was also answered in affirmative.

8. Case set up by original complainant is that accused purchased *toor dal* on 12.07.2012 of value of Rs.6,08,770/- on credit basis and issued cheque towards repayment of said price. It is further specific case of complainant that goods were delivered and there is acknowledgment by manager of accused namely, Jadhav, which is at Exhibit 63.

9. On the other hand specific defence of accused is that there was no cash credit business of *dal* on 12.07.2012, however, there was a transaction of hand loan of Rs.50,000/- and in that transaction, blank cheque by way of security was handed over. Complainant filled the details without his consent and misused the cheque to show it to be of transaction of *dal*.

10. as is the fundamental principle, it is the accused who has to prove transaction of *dal* on credit and on instrument in question being signed and handed over by accused towards said debt. No doubt, cheque is standing in the name of accused. In the light of defence taken, in the considered opinion of this court, mere issuance of cheque was not expected to be proved but equally, legally enforceable debt was required to be proved. Case of complainant of deliver of goods is denied by accused. Case of complainant is acknowledgment of delivery by manager of accused but said witness who is examined as DW2, has denied Exhibit 63 it toto. Even complainant has admitted that contents of the cheque in question are not penned down by accused. Further, the person in whose presence hand loan was extended, namely Shivaji, is not examined. Under such circumstances, defence put forth by accused seems to be *prima facie* probabilized and there is rebuttal.

11. Hence, in view of above, no fault can be found in the dismissal of complaint as very transaction of purchase of *dal* on credit and its legal dues to be existing at the time of cheque not being also demonstrated by other record, there is no merit in the leave application. Hence, I proceed to pass the following order:

ORDER

The application is rejected.

[ABHAY S. WAGHWASE, J.]

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