



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

**APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY
NO.82 OF 2022**

Ramesh s/o Gyanu Shinde
Age: 70 years, Occu.: Retired,
R/o Prabhu Ramchandranagar,
Dhule Road, Chalisgaon,
Tq.Chalisgaon, Dist.Jalgaon.

..Applicant
(Ori. Complainant)

Versus

Mukund s/o Onkar Ahire
Age: 50 years, Occ.: Service,
R/o. Maharanapratap Housing Society,
Plot No.11(A), Old Malegaon Road,
Chalisgaon, Tq.Chalisgaon,
Dist.Jalgaon.

..Respondent
(Ori. Accused)

...

Advocate for Applicant : Mr.S.B.Bhapkar
Advocate for Respondent : Mr.Ujwal S.Patil

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 05 JANUARY, 2024

PRONOUNCED ON : 09 JANUARY, 2024

ORDER :

1. Original complainant, who had instituted proceedings under Section 138 of the Negotiable Instruments Act (for short "NI Act") against present respondent, is aggrieved and dissatisfied by judgment and order dated 16-07-2022 passed by the learned Judicial

Magistrate, First Class (Court No.3), Chalisgaon, thereby acquitting respondent from offence punishable under Section 138 of the NI Act.

2. Learned Counsel for applicant would submit that friendly relations between parties went undisputed as well as borrowing of amount is not countered by accused. According to him, issuance of cheque as well as signature over the same, towards repayment of friendly loan also was not seriously challenged in the trial Court by accused. However, still even when learned trial Court has observed that there is presumption under Section 118 of the NI Act, merely on the count that there is concealment of previous transaction, complaint is dismissed and accused is acquitted. Further according to him, there were two distinct transactions at two different times, but learned trial Court misconstrued the case of complainant as well as evidence on record and reached to above finding, which is patently erroneous and therefore, complainant intends to challenge the judgment of the trial Court and hence, he seeks leave.

3. After hearing learned Counsel for both the sides and on going through the papers before this Court, it seems that present applicant had instituted proceedings bearing SCC No.1040 of 2017 against

respondent alleging commission of offence under Section 138 of the NI Act. It appears that complainant examined himself at exh.26 and also adduced documentary evidence comprising of cheque, cheque written memo, legal notice and RPAD envelop.

4. Accused does not seem to have adduced any evidence but his defence is that cheque given for security has been misused which was pertaining to previous loan. In support of this contention, he has relied on the case of *M/s.Sim Enterprises v. Shri Shaikh Abdul Rashid Choudhary & Anr.* [2019 ALL MR (Cri.) 99].

5. Taking into consideration above material, it is emerging that borrowing of loan is not disputed nor there is any dispute about issuing cheque by causing signature. On cheque being dishonoured, and on institution of complaint, defence seems to have been taken that there is misuse of cheque, which was issued by way of security towards previous transaction. Learned trial Court seems to have observed that there is concealment of previous transaction and on such count, complaint seems to have been dismissed.

6. Consequently, the above matter needs re-appreciation and re-analysis. Hence, matter is required to be dealt in detail in appeal to

ascertain whether any previous transaction, if not brought to the notice of the Court, itself amounts to concealment dis-entitling relief of allowing complaint. Resultantly, I proceed to pass following order.

ORDER

- I. The application stands allowed.
- II. Leave is granted to the file Appeal.
- III. Registry to register the Appeal.
- IV. Appeal stands **admitted**.
- V. Call record and proceedings.

(ABHAY S. WAGHWASE)
JUDGE