2024:BHC-AUG:383

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY NO. 123 OF 2023

Om Sai Transport,
Through its Proprietor
Rajesh Mahadeo Kakade,
Age 54 years, Occu. Business,
R/o Shahunagar, Kedgaon,
Ahmednagar. … Applicant
[Orig. Complainant]

versus

Pandit Baburao Shinde
Age 34 years, Occu. Business,
R/o Pokhari Kanher,
Taluka Parner, District Ahmednagar. … respondent
[Orig. Accused]

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Mr. Gautam J. Pahilwan, Advocate for the applicant.

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 05.01.2024
Pronounced on : 10.01.2024

ORDER :

1. By invoking Section 378(4) of the Code of Criminal Procedure, the original complainant is seeking leave to question the judgment and order of acquittal passed by learned Additional Chief Judicial Magistrate, Court No.12, Ahmednagar in SCC No. 3640 of 2021 acquitting thereby the present respondent from offence punishable Section 138 of the Negotiable Instruments Act, 1881 [NI Act].

2. Learned counsel for the applicant submits that there was a sale transaction of a tempo and the consideration of transaction was Rs.11,50,000/-. An agreement was executed. That, at the initial stage, accused-respondent had paid Rs.50,000/- as earnest amount and further made payment of Rs.72,600/- in December 2020. Accused had taken responsibility of repaying the loan on the vehicle to the tune of Rs.8,04,000/-. Accused was thereby liable to pay Rs.2,23,400/- and towards such responsibility, he issued cheque but it was returned dishonored for want of sufficient funds and therefore, after dispatching notice, complaint was filed.

3. It is pointed out that there was overwhelming evidence satisfying all necessary ingredients for attracting Section 138 of the NI Act. However, learned trial court failed to appreciate the evidence in spite of holding issuance of cheque, signature over it and availability of Section 118 and 139 of the NI Act. Learned Trial Court merely acquitted the accused holding that accused had rebutted the presumption which had fallen on him. That, original complainant intends to file appeal and hence the leave.

4. After considering the submissions and on going through the papers, present applicant seems to have instituted the proceedings

SCC 3640 of 2021 on the premise that there was a sale transaction of a tempo vehicle. Case is set up that initially Rs.50,000/- by way of earnest amount was paid and further again Rs.72,600/- was paid in December 2020 by the accused. That, accused had taken responsibility and liability of repaying the loan on which the vehicle was purchased. However, in the complaint, it is stated that accused was also liable to pay amount of Rs.2,23,400/- in order to make payment and in that connection, he had issued a cheque which was returned dishonored and therefore proceedings under the NI Act were initiated.

5. *Prima facie* it appears that to substantiate his case, complainant has tendered his own evidence and reiterated the contents of the complaint. Defence set up by way of suggestions to the complainant is that earnest amount is received by way of cash to the tune of Rs.50.000/-. That, accused had tendered blank cheque and that further there is payment of Rs.72,600/- by way of cash. Complainant has admitted about two loan transactions over the vehicle i.e. one loan of Rs.8,05,842/- and second was to the extent of Rs.1,72,599/-. But complainant corrected himself and denied regarding second loan. However, complainant had admitted payment of Rs.1,22,600/- out of Rs.11,50,000/-. Therefore, contentious issue between the parties

seems to be liability of Rs.1,72,599/-. Accused seems to have placed on record receipt Exhibit 22/1 regarding payment of Rs.1,72,599/- in the loan account of the complainant and it is under signature of respondent-accused. Witness on behalf of the complainant i.e. C.W.2 Swapnil Kelkar has also admitted signature over the receipt. Therefore, there is material indicating payment of disputed amount of Rs.1,72,599/-. Resultantly, it seems that defence has been probabilized by the respondent. Considering the evidence of complainant and the tenor of the cross supporting the case of defence, it is seen that there is issue of legally forcible debt and precisely complainant has not proved legal debt. On the contrary, respondent has probabilized the defence. Therefore, findings reached at by learned trial court cannot be faulted at. No case being made out on merits to grant leave, I proceed to pass the following order:

ORDER

Application for Leave to Appeal by Private Party No. 123 of 2023 is hereby rejected.

[ABHAY S. WAGHWASE, J.]

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