



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO. 49 OF 2021

M/s. Shrikant Agency,
Prop. Shreyas Shrikant Maniyar,
Age : 35 years, Occu. : Business,
R/o. Vakil Colony, Sangamner,
Tal. Sangamner, Dist. Ahmednagar.

... Applicant.
(Orig. Complainant)

Versus

1. Hemant Vishnumal Devani,
Age : 48 years, Occu. Transport,
Prop. Vaishnavi Roadways,
Sindhi Colony, Jail Road,
Nashik Road, Dist. Nashik.

2. State of Maharashtra

... Respondents.

...
Mr. Amrutal Z. Gandhi, Advocate for Applicant.
Mr. K. N. Shermale, Advocate for Respondent No.1.
Mr. S. M. Ganachari, APP for Respondent - State
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 19th JANUARY, 2024

PRONOUNCED ON : 30th JANUARY, 2024

ORDER :

1. By way of instant application, original complainant is seeking leave to question the judgment and order of acquittal, passed by Additional Chief Judicial Magistrate, Sangamner dated 16.09.2021 in S.C.C. No.1224 of 2017, thereby acquitting respondent from offence punishable under section 138 of Negotiable Instruments Act, 1881.

2. It is submitted that, applicant has instituted proceedings under section 138 of N.I. Act on account of dishonour of cheque issued by present respondent towards repayment of dues on account of purchase of spare parts. He pointed out that, only on sole technical ground of notice of demand being not proved, learned trial court has acquitted the accused. Further, according to him, there is no dispute about borrowing of loan. Therefore, there is legally enforceable debt at the end of accused. That, even learned trial Court has categorically held that, there is legally enforceable debt and cheque is issued towards the same, but unfortunately there is acquittal on technical grounds. That, accused did not contest the complaint, still the learned trial court has acquitted the accused. According to him, there is a debatable and legal issue to be agitated during appeal and hence he seeks leave.

3. While opposing the application, learned counsel for accused would submit that, in 138 N.I. Act proceedings, all essential ingredients are required to be established. That, statutory notice within stipulated period is also required to be dispatched and shown to be received and it is further mandatory to get it proved. According to learned counsel, here, complainant had miserably failed to demonstrate the essential requirements

including legally enforceable debt. That, evidence of complainant was otherwise and necessary ingredients were not established beyond reasonable doubt. Consequently, he submits that, no fault whatsoever can be found in the impugned Judgment. Resultantly he prays to dismiss the leave application.

4. After considering the submissions, it seems that, present applicant had instituted 138 N.I. Act proceedings on the premise that, respondent accused is customer of the complainant. Accused maintained account with the complainant towards purchase of material on credit. It is further case that towards repayment of credit to the tune of Rs.61,985/-, cheque dated 18.07.2017 was drawn and issued, but on its presentation, it was dishonoured on 18.07.2017. In complaint it is stated that, for dishonor of cheque notice was issued to the accused on 09.08.2017 putting up demand of cheque amount.

5. It is further averred that, subsequent to dispatch of notice dated 09.08.2017, complainant realized that, said notice was addressed with pet name and not on real name and so to avoid any technical defects, cheque was again re-deposited and when it was again dishonoured, notice was dispatched on 09.09.2017. Even said notice was not claimed and therefore it being good service, cause of action arose.

6. Defence of accused in the trial court was issuing cheque by way of security. Therefore, *prima facie*, there does not seem to be controversy over business relations and there is no serious dispute about material being purchased on credit. Regarding issuance of cheque and signature over disputed cheque, there does not seem to be any issue on behalf of accused.

7. On going through the impugned judgment under challenge, it transpires that, learned trial court has held that, there is transaction between complainant and accused and there was legal liability at the end of accused. It appears that, learned trial court has answered point nos.2 and 3 in affirmative. However, case of complainant is not accepted on the ground that, there was no cause of action in view of the date of notice.

8. Observations regarding cause of action seems to have been dealt in para 17 of the Judgment that, *"It is necessary to mention that, cause of action arises to the complainant only when demand notice is received by the accused and payment is not made within 15 days thereafter. For this initially the complainant has to prove issuance of demand notice to the accused. If the record is perused, complainant has placed on record along with Exh.3, a notice dated 07.09.2017. However, if the evidence of complainant*

is considered, nowhere the complainant has formally proved that this particular notice to be the same notice dated 09.09.2017. there is no exhibited notice dated 09.09.2017 on record, which can be read in evidence.”

It further transpires that, answer given by accused in his statement under section 313 of Cr.P.C. are further taken into account while acquitting the accused.

9. After appreciating the submissions put-forth by each of the side, here it emerges that, firstly, there is no dispute about transaction between complainant and accused. Secondly, there is no dispute about transaction made on credit and amount due towards accused. There is also no denial of issuance of cheque or signature over it.

10. What transpires from the contents of the complaint is that, initially notice was issued on 09.08.2017. The same is admittedly received by accused. However, complainant claims and has affirmed in the complaint that he realized that, real name of accused is Hemant and not Raju, which is his pet name and to avoid technical defect, cheque was again presented, and on its dishonour, second notice was issued with rectified name on

09.09.2017. However, in the complaint reference of only previous notice is inadvertently said to be reflected. Learned counsel for complainant has urged that it was mere typographical mistake as regards to date is concerned.

11. Law is fairly settled that, cheque can be presented more than once during its life time. Second notice on subsequent dishonour can also be dispatched. Law to this extent is recently dealt in the case of *Sicagen India Ltd. v. Mahindra Vadineni and Ors.*, MANU/SC/0041/2019. Even similar issue is dealt in the case of *MSP Leathers v. S. Palaniappan and Anr*, 2013 (1) SCC 177.

12. Therefore, on considering the submissions advanced by both sides, here there is no denial of transaction and issue is only about exact cause of action, therefore, here there is a legally debatable issue, which needs to be dealt and addressed during appeal, i.e. regarding validity of second notice, exact cause of action and the degree of impact on failure to mention about it in the complaint, even when initial presumption has been drawn in favour of complainant by trial judge.

Therefore, for above reasons, leave to file appeal deserves to be granted. Hence, I proceed to pass following order :-

ORDER

- (i) 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, J.)