



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PRIVATE PARTY NO. 128 OF 2023

Ma. Mukhya Lekha Va Vitta Adhikari,
(Chief Accounts and Finance Officer),
Zilla Parishad, Jalna
Through Smt. Vidya V. Kanade,
Age: 32 years, Occu: Executive Engineer,
Rural Water Supply Division,
Zilla Parishad, Jalna.

... Applicant

Versus

1. Mr. Gangadhar Sukhdev Sapate,
Age : 50 years, Occu: Proprietor
of Wastage Scrape Centre,
R/o: Kailashnagar, Samshan Maroti Road,
Aurangabad.

(Orig. Accused)

2. The State of Maharashtra

... Respondents

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Mr. Bhushan B. Kulkarni, Advocate for Applicant.
Respondent No.1 served.

Mr. S. M. Ganachari, APP for Respondent No.2-State

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 30.01.2024

Pronounced on : 06.02.2024

ORDER :

1. In spite of matter being kept back on two occasions, i.e. in the morning session and afternoon session on 30.01.2024, none appeared for respondent no.1 and therefore leave application is taken up for decision on its own merits.

2. On account of acquittal of respondents from offence under Section 138 of the Negotiable Instruments Act, 1881 [NI Act] vide judgment and order dated 11.04.2023 passed by learned JMFC-2, Jalna in SCC No. 1295 of 2017, original complainant is hereby seeking leave to file appeal.

3. It is submitted that complaint was instituted contending that accused is involved in the business of sale and purchase of scrap. That, accused had responded to the e-tender and it was duly accorded to him. That, accused took material worth Rs.24,86,268.75/-. That, however, he has only paid Rs.16,90,000/- and he had issued cheque towards payment of remaining amount. However, cheque got dishonored. That, transaction was proved and cheque and signature over it was not disputed. Thus, it is submitted that initial presumption was discharged by complainant. However, learned trial Judge acquitted accused on the sole ground that amount pending shown in the complaint is lower than the amount reflected on the cheque. Therefore, according to learned counsel, as there is improper appreciation of evidence and law, he seeks leave.

4. After considering the submissions advanced by learned counsel for the applicant and on going through the papers, it seems that SCC

No. 1295/2017 was instituted by complainant alleging sale and purchase of scrap by accused in response to e-tender issued by complainant, which seems to be an instrumentality of Zilla Parishad. Averments in the complaint are that the scrap material which accused took away was worth Rs.24,86,268.75/-. Part payment was made to the tune of Rs.16,90,000/- and dues of over Rs.8,00,000/- was remaining and therefore cheque to that extent drawn by accused was issued but on its presentation it was dishonored with remark as “funds insufficient”. *Prima facie* it seems that there after statutory notice has been dispatched and even received by accused but payment has allegedly not been made.

5. Defence of accused is that he has already made payment and there are no dues and excess amount is tried to be extracted.

6. Therefore, the ground on which learned trial court seems to have acquitted the accused is that there is variance in the amount due and cheque amount. However, *prima facie* it seems that presumption under Section 118 and 139 of the NI Act has been drawn by learned trial Judge and acquittal seems to be on above mentioned sole ground. Learned trial Judge seems to have considered the document Exhibit 42, a communication dated 22.02.2017. Therefore, after

computation in para 10, learned trial Judge reached to a finding that amount of Rs.7,96,268.75/- was in fact remaining by way of balance but amount reflected over the cheque Exhibit 20 is Rs.8,00,000/- and is thus apparently more than dues. Relying on the judgment of this Court in *Laxmikant D. Naik Karmali v. Santosh V. Naik* 2006 (2) Bom.C.R. (Cri) 830, acquittal seems to have been granted holding that there was no legally enforceable debt of the amount which was appearing on the cheque. Therefore, there seems to be proper appreciation. Though initial presumption tilted in favour of the complainant, when very crucial aspect of legally enforceable debt at the time of drawing cheque is mismatched, no fault can be found in the findings of the trial court. There is no merit in the application. Hence, leave is liable to be refused. Accordingly, I proceed to pass the following order :

ORDER

The application is rejected.

[ABHAY S. WAGHWASE, J.]