IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3860 OF 2023
IN
CRIMINAL APPEAL (ST.) NO. 10813 OF 2023

Subhash s/o Ravan Kasbe,
Age: 42 years, Occ: Teacher,
R/o. Nakshatra Apartment,
Flat No.5, Honaji Nagar,
Jatwada Road, Harsool, Aurangabad. **... Applicant**

Versus

Sanjay s/o Anna Khandare,
Age: 43 years, Occ: Agriculture,
R/o. Matangwada, Near Balaji Mandir,
Deulgaon Raja, Dist. Buldhana. **... Respondent.**

...
Mr. Shyam C. Arora, Advocate for Applicant
Mr. Sachin M. Nannaware, Advocate for Respondent sole
...

CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 22nd JANUARY, 2024
PRONOUNCED ON : 30th JANUARY, 2024

ORDER :

1. This is an application for leave to file appeal against judgment and order passed by learned Judicial Magistrate First Class, Aurangabad dated 16.08.2023 in S.C.C. No. 2923 of 2020, thereby acquitting accused from offence punishable under section 138 of Negotiable Instruments Act, 1881.

2. Learned counsel for applicant would submit that,

accused respondent had obtained friendly loan on account of treatment of his wife. Out of acquaintance, amount of Rs.8,00,000/- was extended by way of friendly loan twice i.e. of Rs.2,00,000/- and Rs.6,00,000/- respectively. Towards repayment of the same, cheque was issued. However, the same was dishonoured. It is pointed out that learned trial court in spite of existence of essential ingredients to attract offence, acquitted the accused on the sole ground that complainant failed to establish legally enforceable debt. He pointed out that provision under section 56 of N.I. Act are in fact misconstrued. That, learned trial court had already drawn statutory presumption, but still acquitted the accused. According to him, there is wrong interpretation of both evidence as well as law and further according to him there is a good case to be agitated in appeal, he seeks leave.

3. Per contra, learned counsel for respondent would submit that, complainant miserably failed to make out case for consideration. That, complainant failed to establish legally enforceable debt. That, in fact by virtue of section 56 of NI act, which came into play, conviction could not be recorded and thereby learned trial court committed no error in acquitting the accused. Hence, he prays to dismiss the appeal.

4. After appreciating the submissions advanced by both sides and on going through the papers, it transpires that, S.C.C. No. 2923 of 2020 was instituted by present applicant on the premise that through complainant's friend he got acquainted with accused. That, considering the medical exigency for wife of accused, Rs. 8,80,000/- were extended by way of friendly loan. Towards repayment of said dues, cheque was issued, but it was dishonoured, therefore, after statutory notice, above complaint was instituted.

5. Defence raised by accused in trial court that he did not prove amount quoted in the cheque, rather only Rs.80,000/- were taken and the same are already repaid and that there is misuse of cheque given by way of security. In support of above case, accused seems to have adduced evidence of his wife DW1 Bhagirathi and DW2 Daulat.

6. *Prima facie*, complainant asserted dues to the tune of Rs.8,80,000/-, but accused came with a case of borrowing only Rs.80,000/-. Further case of defence is that, after handing over cheque and before its presentation Rs.10,000/- were paid to the complainant and it was accepted. Complainant seems to have admitted said part payment.

7. On *prima facie* going through the judgment, it seems that, in view of respective cases advanced by both parties, learned trial court in its judgment, in paragraph 16 has dealt and discussed law spelt out in the case of ***Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel and Ors.*** (Cri.Appeal No.1497/2022, dtd.11.10.2022), which is on the point of section 56 read with section 15 of N.I. Act. The observations of the Hon'ble Apex Court are as under :-

> *"Under Section 56 read with Section 15 of the Act, an endorsement may be made by recording the part-payment of the debt in the cheque or in a note appended to the cheque. When such an endorsement is made, the instrument could still be used to negotiate the balance amount. If the endorsed cheque when presented for encashment of the balance amount is dishonoured, then the drawee can take recourse to the provisions of Section 138. Thus, when a part- payment of the debt is made after the cheque was drawn but before the cheque is encashed, such payment must be endorsed on the cheque under Section 56 of the Act. The cheque cannot be presented for encashment without recording the part payment. If the unendorsed cheque is dishonoured on presentation, the offence under Section 138 would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment."*

8. Learned counsel for applicant laid heavy stress on the point of misinterpretation of the same provision by the learned trial Court. However, considering the judgment on above point discussed in paragraph Nos. 16 and 17 about admission of complainant acknowledging Rs.10,000/- after drawing of cheque

and before its presentation, in view of said provision, complainant was expected to acknowledge and endorse part payment received by him, regarding which there is clear admission in the cross. However, as there was no such acknowledgment by way of endorsement, the amount reflected in the cheque apparently was not due or enforceable on its presentation.

9. In view of above, no fault can be found in the manner of appreciation at the hands of learned trial court. The findings are in consonance with the material on record. No case for leave being made out, I proceed to pass following order :-

ORDER

The application stands rejected.

(ABHAY S. WAGHWASE, J.)

Tandale