IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO. 261 OF 2018

. Hanmant S/o. Venkatrao Kawtikwar
Age: 50 years, Occu.: Teacher,
R/o. Near Gajanan Mandir, Cidco,
New Nanded. ....Applicant
(Ori. Complainant)

Versus

1. Sridhhar S/o. Narayanrao Mangulkar
Age: 45 years, Occu.: Business,
R/o. ND – 42, Cidco, New Nanded.

2. Sunil S/o. Narayan Mangulkar
Age: 48 years, Occu.: Business,
R/o. Sandeep Medical, ND – 42,
Cidco, New Nanded. .....Respondents

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Advocate for Applicant : Mr. Sachin Joshi
Respondent no.1 served through Paper Publication.
Advocate for Respondent no.2 : Mr. A.G.Talhar

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 18 JANUARY, 2024
PRONOUNCED ON : 23 JANUARY, 2024

ORDER :

1. Aggrieved by the judgment and order of acquittal passed by the learned Judicial Magistrate, First Class, 3rd Court, Nanded in S.C.C. No.759 of 2012 acquitting respondents from offence under

Section 138 of the Negotiable Instruments Act (for short “the NI Act”), original complainant has moved instant application seeking leave to file appeal to challenge the above judgment.

2. Learned Counsel for the applicant would submit that there was a transaction of hand loan of Rs.24,00,000/-. That learned trial Court has acquitted accused holding that applicant / complainant failed to prove his own financial capacity to extend huge loan. Further it is pointed out that even accused no.2 is acquitted holding that he incurs no liability being mediator and merely on such count complaint is dismissed and both accused are acquitted. According to him, there is improper appreciation of evidence as well as law and therefore, it is submitted that there being a good case in appeal on merits, leave to challenge impugned judgment be granted.

3. While opposing the above application, learned counsel for respondent no.2 would submit that there is correct appreciation of evidence. That required case for allowing application was not at all made out. That learned trial Court rightly held that for attracting offence under Section 138 of the NI Act, cheque must have been issued by the person from an account maintained by him. That there

was no legally enforceable debt and the same was not established. That moreover, it is pointed out that though applicant / complainant claimed regarding issuing loan to the tune of Rs.24,00,000/-, he failed to demonstrate his such financial capacity to extend said amount by way of loan. That moreover, accused no.2 has no liability whatsoever and therefore, learned trial Court has committed no error in acquitting the accused persons and he prays to dismiss the appeal.

4. After hearing submissions of both sides and after going through record and impugned judgment, it transpires that proceedings under Section 138 of the NI Act were instituted by present applicant contending that an amount of Rs.24,00,000/- is due towards accused persons. When amount was demanded, only Rs.11,00,000/- was agreed to be paid and there is agreement to that extent. Towards repayment, cheque was issued to the tune of Rs.3,79,000/-, but on its presentation it was returned dishonoured. Demand notice was despatched, but it was refused and therefore, proceedings under N.I.Act were initiated.

5. It *prima facie* seems that in support of his case, complainant has examined himself, one witness namely Sudhir Devidasrao

Damkondekar, who was Bank official and one Pandri Govindrao Shinde, who was said to be party to the agreement. Documents like cheque, bank memo, postal receipt etc. are also placed on record.

6. Defence set up in the trial Court was regarding denial of issuance of cheque and signature over it. However, presentation of cheque and its dishonour is proved. The question is whether complainant established extension of the loan to the tune of Rs.24,00,000/-. Complaint *prima facie* shows that complainant is teacher by profession. Defence questioned his very financial capacity to extend huge loan. Complainant in above backdrop, took a stand that he has agricultural land. Therefore, it was expected of him to demonstrate his package as well as agricultural income earned from it, but he failed to demonstrate the same by adducing any oral or documentary evidence. It is difficult to accept that with occupation as a teacher and in absence of income from other source or income tax returns, he had financial capacity to extend loan to the tune of Rs.24,00,000/-. Even his complaint on *prima facie* examination shows that for what purpose loan was demanded and forwarded and when, all particulars to that extent are patently missing from the complaint and affidavit. Therefore, when complainant *prima facie*

failed to establish very aspect of extension of loan or legally enforceable liability, case cannot be accepted and further action cannot be taken even if there is presumption under Sections 118 and 139 of the Negotiable Instruments Act. Defence seems to have rebutted the presumption. Therefore, taking such material into consideration, no fault can be found in the appreciation of evidence by the learned trial Court. No good ground is made out to grant leave as prayed for. Hence, following order is passed :

ORDER

Application for Leave to Appeal by Private Party No.261 of 2018 is rejected.

(ABHAY S. WAGHWASE)
JUDGE

SPT