

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

APPLICATION FOR LEAVE TO APPEAL NO.23 OF 2024

Dastagir Allisher Shaikh	... Applicant
V/s.	
Sameer Sadik Husen Shaikh and Anr.	... Respondents

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Mr. Mukesh Pabari for the Applicant.

None for the Respondents.

CORAM : MANISH PITALE, J.

DATED : JULY 9th, 2024.

P.C.:

1. Heard Mr. Mukesh Pabari, learned counsel for the Applicant.
2. By this application, the applicant-original complainant is seeking leave to appeal under Section 378(4) of the Code of Criminal Procedure, 1973, in respect of judgment and order dated 19th August 2023, passed by the Court of Judicial Magistrate First Class, CBD Belapur Navi Mumbai, whereby the aforesaid Court acquitted the respondent No.1 for offence punishable under Section 138 of the Negotiable Instruments Act, 1881.
3. The contesting respondent No.1 was served and affidavit of service is on record. There is no appearance on behalf of the contesting respondent.
4. Learned counsel for the applicant submits that the

Magistrate committed an error in acquitting the respondent No.1 and the reasoning mentioned in paragraph No.16 and 17 of the judgment and order is unsustainable. In that regard, attention is invited to the contents of the complaint and the affidavit in evidence as well as the cross-examination of the respondent-original complainant.

5. This Court perused the documents on record. The Magistrate has proceeded to be hold in favour respondent No.1, on the basis that the complainant failed to discharge the initial burden of proving that the subject cheque, was issued in discharge of legal debt or liability. On that basis, it was concluded that the presumption under Section 139 of the aforesaid Act, could not be raised against the respondent No.1 and he was acquitted.

6. A perusal of paragraph Nos. 16 and 17 of the judgment and order of the Magistrate, shows the fact that Rs.98,000/- was received in the bank account of the applicant has been held as a factor against the applicant, in as much as, the Court of Magistrate has proceeded on the basis that the receipt of the said amount was part payment made by the respondent No.1 and this ought to have been accounted for by the applicant while claiming that the dishonour of cheque ought to lead to conviction of respondent No.1 under Section 138 of the aforesaid Act.

7. In that context, when the complaint of the applicant is perused, particularly paragraph Nos. 11 to 15 thereof, it is found that the consistent case of the applicant was that the cheque for an amount of Rs.3,80,000/- was issued as the respondent No.1 had

agreed to pay an amount of Rs.50,000/-towards damages, in addition to an amount of Rs.3,30,000/- which the respondent No.1 was required to pay to the applicant. This was in the backdrop of a police complaint lodged by the applicant. The said cheque was dishonoured and in paragraph No.15 of the complaint, it was specifically stated by the applicant that after dishonour of the cheque, when the applicant approached the respondent No.1, and threatened that further offences would be registered against the respondent No.1 that the said respondent pleaded for time of one month to arrange for amount of Rs.1,00,000/- towards “further damages”. It was the specific case of the applicant that the amount of Rs.98,000/- was received in three installments of Rs.50,000/-, Rs.20,000/- and Rs.28,000/- in the month of August 2020. The cheque itself was dishonoured earlier on 22nd July 2020. The affidavit-in-evidence of the applicant and his statement in the cross-examination are consistent with the aforesaid stand taken in the original complaint.

8. It appears that the said specific stand of the applicant and his explanation regarding the receipt of amount of Rs.98,000/-, particularly its receipt after dishonour of the cheque was not appreciated by the Court of Magistrate while holding against the applicant and acquitting the respondent No.1.

9. In view of the above, the applicant has made out a case for granting leave to appeal.

10. The application is allowed accordingly.

11. The Registry is directed to register appeal and list the same

before the appropriate bench.

12. The application for leave to appeal is disposed of.

(MANISH PITALE J.)