



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPLICATION NO.1125 OF 2022

IN

CRIMINAL APPEAL (ST.) NO.1771 OF 2022

(Dilip s/o Rushipal Katre Vs. Shevendra s/o Hemraj Ambule)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. V.R. Borkar, Advocate for the appellant.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- OCTOBER 1, 2024.

By preferring this application, the complainant is seeking leave to prefer an appeal. The complainant has challenged the judgement and order of acquittal passed by the Judicial Magistrate First Class, Tirora in S.C.C. No.199/2018 dated 07.12.2021 by which the accused is acquitted from the offence punishable under Section 138 of the Negotiable Instrument Act, 1881.

2. Brief facts which are necessary for the disposal of the application are as under:

(i) The accused is well acquainted with the complainant and having cordial relation between them. The accused is dealing with the business of property dealing. On 18.05.2016 complainant's brother Rajesh had purchased one land from accused. The accused belongs to reputed family of Indora, Tah. Tirora and his father was ex-chairman of A.P.M.C. The accused was also member of

Gram Panchayat. Therefore the complainant had faith upon accused. In July 2016 accused approached to complainant and brought three sale deeds of one plot at Dighori, Nagpur. Last sale deed dated 11.08.2014 was executed in favour of M/s. Orange Home Construction having two partners. Accused informed the complainant that he himself and his partner purchased that plot from M/s. Orange Home Construction and agreement would be executed in January 2016. He paid Rs. 5,00,000/- as earnest amount and now accused intending to construct flat scheme over said plot. The complainant and his brother shows their willingness to purchase two flats and accordingly paid the consideration amount. As against the earnest amount i.e. Rs.20,00,000/-. Though accused agreed to deliver the possession within 14 months but till February 2017 no possession was given, and therefore, the complainant demanded the amount on which accused issued the four post dated cheques for an amount of Rs.30,00,000/- in favour of the complainant. The said cheques were deposited which return back with an endorsement. After issuance of the notice, the accused failed to pay the amount, and therefore, complainant constrained to file the complaint under Section 138 of the N.I. Act before the Judicial Magistrate First Class, Tirora.

3. After adducing the evidence and after appreciating the same, the trial Court acquitted the accused by observing that complainant failed to prove that

there was a legal and enforceable debt and he was having capacity to pay such amount.

4. Learned Counsel for the appellant submitted that as far as the ground on which the accused is acquitted is concerned, it is not the requirement that the complainant to show his financial capacity. He submitted that unless accused sets of a case questioning the complainant's capacity it is not necessary that the complainant has to show his financial capacity. In support of his contention, he placed reliance on ***Tedhi Singh Vs. Narayan Dass Mahant [(2022) 6 SCC 735]*** wherein in paragraph No.10 the Hon'ble Apex Court considered that the trial Court and the First Appellate Court have noted that in the case under Section 138 of the N. I. Act the complainant need not show in the first instance that he had the capacity. The proceedings under Section 138 of the N. I. Act is not a civil suit. At the time, when the complainant gives his evidence, unless a case is set up in the reply notice to the statutory notice sent, that the complainant did not have the wherewithal, it cannot be expected of the complainant to initially lead evidence to show that he had the financial capacity. To that extent the Courts in our view were right in holding on those lines. However, the accused has the right to demonstrate that the complainant in a particular case did not have the capacity and therefore, the case of the accused is acceptable which he can do by producing independent

materials, namely, by examining his witnesses and producing documents. It is also open to him to establish the very same aspect by pointing to the materials produced by the complainant himself. He can further, more importantly, achieve this result through the cross examination of the witnesses of the complainant. Ultimately, it becomes the duty of the Courts to consider carefully and appreciate the totality of the evidence and then come to a conclusion whether in the given case, the accused has shown that the case of the complainant is in peril for the reason that the accused has established a probable defence.

5. On going through the nature of the evidence in this case, it appears that the entire judgment is based upon the facts that the complainant has not established that he was having sufficient means to pay the said amount. As observed by the Hon'ble Apex Court, it is not necessary to see the financial capacity of the complainant at the initial stage unless it was pointed out by the accused by giving reply to the notice that the financial capacity of the complainant is not such that he is able to give a finance to the accused. Thus, in the light of the above observation in the present case also as no notice was replied with an objection that the financial capacity is not to purchase the flats by incurring such expenses and there is no notice replied by the accused to show that the complainant has no means to purchase the flats by

incurring the said expenses. Thus, the observation of the trial Court, on the basis of observing the financial capacity in the light of the judgment of the Hon'ble Apex Court, appears to be contrary to the observation of the Hon'ble Apex Court. Thus, learned Counsel for the appellant has pointed out that he has many arguable points in the present appeal. In view of that, leave requires to be granted to prefer an appeal.

6. In view of that, the application is allowed.
7. Leave is granted.
8. The application is disposed of.
9. The appeal be registered.

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On registration of the appeal, notice be issued on merits to the respondents, returnable after four weeks.

(URMILA JOSHI-PHALKE, J.)