



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

CRIMINAL APPLICATION NO.299 OF 2020

(Natthu s/o Shivram Dahule Vs. Sunil s/o Damodhar Potdukhe and anr.)

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

Court's or Judge's Order

Mr. R.R. Vyas, Advocate for the appellant.
Mr. M.R. Ali, Advocate for the respondents.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- JULY 8, 2024.

By preferring this application, the appellant is seeking leave to file appeal against the acquittal on the ground that learned trial Court has not considered that the cheque is issued in discharge of the legal and enforceable debt. Learned trial Court has not appreciated the evidence and the admission given by the defence witness. Thus, the appellant has arguable points in the present appeal, and therefore, leave is to be granted.

2. Learned Counsel for the respondents submitted that learned trial Court has rightly considered that complainant has to prove firstly the issuance of the alleged cheque by the accused towards the discharge of the legal and enforceable debt or liability and secondly the cheque was dishonoured after presenting for realisation within the period of its validity. He submitted that learned trial Court has considered all the facts and thereafter observed that the complainant failed to establish that the

cheque was issued against the discharge of legal and enforceable debt and in view of that acquitted the respondents. In view of that, no grounds are made out for leave to file appeal.

3. After perusal of the impugned judgment and the copies of the depositions it reveals that the trial Court has observed that from the record notices (Exhibit 109 and 116) are filed on record shows the transaction as averred by the complainant in the complaint and evidence adduced in support thereof but these materials are clearly appear to be unlawful and thus made void the alleged transaction and liability of accused persons. He further observed that the sale-deed (Exhibit 129) has not supported the contention made by the complainant in the complaint and affidavit. The material available on record is sufficient enough to rebut the presumption available in favour of the complainant under Section 118 and 139 of the N.I. Act. He further observed that the complainant has measurably failed to prove the issuance of cheque in question for legal and enforceable debt. The observation of the trial Court shows that the endorsement on the cheque shows that cheque is dishonoured not for the funds insufficient but it was for the reason of payment stuck. The defence put forth by the accused is supported by the documentary evidence. It is further observed that as per the testimony of the complainant the demand notice in writing dated 07/05/2010 sent by RPAD through the Advocate and the payment was not made and

therefore, the complaint was filed. The acknowledgments that accused persons were received the registered post and thereby said acknowledgments bears seal and stamp of postal authority. Thus, the trial Court observed that notice is given on a given address and it is received by the accused. The trial Court further observed that in order to bring home the guilt of accused as per Section 138 of the N.I. Act, the complainant has to prove that firstly the issuance of alleged cheque by accused towards discharge of legally enforceable debt or liability, secondly the cheque was dishonoured after presenting for realization within the period of its validity, thirdly cheque was dishonoured with reason of Funds Insufficient, fourthly demand notice in writing intimating the accused as dishonoured of cheque in question and claiming the amount of said cheque within 15 days, fifthly the accused inspite of receipt of demand notice failed to make the payment of cheque within time.

4. From the judgment of the trial Court it clarifies that the complainant has failed to prove the first and foremost ingredient of issuance of cheque in question for legally enforceable debt or liability. The evidence on record shows that the cross-examination of the complainant wherein the admissions given by the complainant shows that there was a sale transaction is taken place in between complainant and accused persons. The recitals of the sale-deed shows the total consideration amount of Rs.2,00,000/- which is appeared to be paid by

accused persons to the complainant i.e. Rs.1,00,000/- on the date of sale by cash and Rs.1,00,000/- by post dated cheque No.388109 dated 31/11/2009. The receipt of this cheque is nowhere disputed by the complainant. The complainant has also not denied the receipt of Rs.2,00,000/- part by cash and above numbered cheque and receipt of said amount thereafter. As per the case of the complainant the cheque was issued towards the consideration amount of the said sale. However, the recitals of the sale-deed shows that the consideration amount was fixed for Rs.2,00,000/-. Thus, the complainant failed to prove that the cheque was issued against the legal and enforceable debt. The foundational facts to attribute the presumption itself are not established by the complainant and therefore, the trial Court rightly acquitted the accused.

5. Though learned Counsel for the appellant vehemently submitted that the trial Court has not considered the evidence and acquitted the accused thought there is a presumption in favour of the complainant but it is well settled that for attracting the presumption under Section 118 and 139 of the N.I. Act the complainant has to prove the foundational facts. On proving the foundational facts the accused has to rebut the said presumption. The admissions given by the complainant during his cross-examination and the recitals of the sale-deed sufficiently shows that the transaction was of Rs.2,00,000/- and the said amount of

Rs.2,00,000/- is already received by the complainant as per his admission. Therefore, the question regarding the cheque issued against the discharge legal and enforceable debt itself is not established by the complainant. Thus, no ground is made out to grant leave to file appeal against acquittal. In view of that, the application deserves to be rejected.

6. Hence, the application is rejected accordingly.

(URMILA JOSHI-PHALKE, J.)

**Divya*