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

CRIMINAL APPLICATION NO.451 OF 2022
IN
CRIMINAL APPEAL (ST.) NO.4174 OF 2022

(Shri Sunil s/o Manohar Neral Vs. Smt. Sarita w/o Manoj Singh)

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

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Ms K. Mandpe, Advocate h/f Mr. Y.B. Mandpe, Advocate for the appellant.
Ms H.S. Singh, Advocate for the respondent.

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

By preferring this application, the appellant is seeking leave to prefer an appeal against the judgment and order of acquittal passed by the Additional Chief Judicial Magistrate (Special Court for S.138 N.I. Act), Nagpur in Sum. Criminal Case No.2699/2017 dated 04.05.2022 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 follows:

The accused and wife of complainant are well acquainted with each other and there was friendly relationship between both of them. In the year 2014, the accused approached to the wife of the complainant and disclosed that she is in need of financial assistance and requested for a hand load. Accordingly, the complainant advanced hand loan to the accused and thereafter on various occasions the accused has obtained the handloan of Rs.12,60,000/- from the complainant time to time. Though complainant has demanded the amount the accused agreed to refund the loan amount and accordingly on 13/04/2016 she has paid Rs.3,99,000/- by cash and promised to pay the remaining amount of Rs.8,61,000/- within 6 months but as per the agreement she has not repaid the amount and on demand she issued a cheque bearing No.000148, dated 13/11/2016 for the amount of Rs.5,00,000/- drawn on Bank of India, Mankapur Branch, Nagpur. The said cheque was deposited by the complainant in his account but was returned with an endorsement "Funds Insufficient" on 04/01/2017. Thereafter the complainant issued demand notice on 11/01/2017 and called upon the accused to make the payment; however, the accused failed to pay the amount, and therefore, complaint is filed under Section 138 of 'the Act'.

3. Learned trial Court has taken the cognizance of the complaint and issued the process. The accused appeared, the plea was recorded vide Exh. 19. In order to establish the case, the complainant filed his affidavit of examination-in-chief as well as examined Priya Ramdas Pawar as a Witness No.2. Besides the oral evidence, the complainant also placed reliance on the following

documents:

1. Cheque bearing No.000148 - Exh. 23,
2. Cheque return memo - Exh. 24,
3. Cheque bearing No. 004283- Exh. 25,
4. Cheque return memo - Exh. 26,
5. Stamp paper dated 13/04/2016- Exh.27,
6. Envelop with Notice - Exh. 28,
7. Notice – Exh.29.
8. Account statement of accused-Exh.49 and
9. Certificate – Exh.50.

4. After appreciating the evidence of both the sides learned trial Court held that the complainant failed to prove that there was a legal and enforceable debt and cheque was issued in discharge of the legal and enforceable debt and acquitted the accused. Being aggrieved and dissatisfied with the same, present appeal along with the application for leave to file appeal is preferred.

5. Learned Counsel for the applicant submitted that the signature on the cheque is not disputed by the accused. There was legal and enforceable debt and the cheque was issued in discharge of legal and enforceable debt. The accused has also executed an undertaking and in view of that undertaking it is established that there was legal and enforceable debt and cheque was issued in discharge of legal and enforceable debt. Thus, the

ingredients of the offence punishable under Section 138 of the N.I. Act are made out but learned trial Court has not considered the same and erroneously acquitted the accused. He submitted that the appellant has many arguable points in the present appeal, and therefore, leave be granted.

6. Learned Counsel for the respondent strongly opposed the application and she submitted that in fact the transaction was of hand loan and there was legal and enforceable debt itself is not proved. Thus, the complainant has not proved that there was legal and enforceable debt and the foundational facts are not proved therefore, presumption will not attract. In view of that, the application deserves to be rejected.

7. I have heard learned Counsel for both the parties. Perused the record as well as the impugned judgment from which it reveals that as per the allegation the cheque was issued against the discharge of legal and enforceable debt. As far as the legal and enforceable debt is concerned, the complainant has to adduce the evidence to show that the cheque was issued against the legal and enforceable debt and after depositing the cheque it was dishonoured and after issuance of notice the amount was not paid. In view of that, the offence is committed. The entire reliance of the complainant is on his oral evidence as well as the documentary evidence which is at Exh.27

which allegedly executed by the accused. The evidence on record and the observation of the trial court in the impugned judgment shows that Exh.27 is a doubtful document as the evidence of the complainant shows that on 13/04/2016 the accused purchased the stamp paper and given assurance pertaining to repayment of the balance amount. However, Exh.27 shows that it was purchased on 14/03/2016. It is further observed that Exh.27 shows that the accused received Rs.12,60,000/- from the complainant and his wife. However, these allegations are absent in the complaint. The trial Court further observed that the complainant failed to examine his wife to prove that she has advanced hand loan to the accused, and therefore, further observes that the legal and enforceable debt is not proved. In view of that, the accused entitled to be acquitted from the charges.

8. After perusal of the impugned judgment it reveals Exh.27 as per the evidence of the complainant was executed on 13/04/2016 by purchasing a stamp whereas the date on the stamp is mentioned is of 14/03/2016. The recitals of the complaint shows that there was a friendly relationship between the wife of the complainant and the accused and it was the wife of the complainant who has advanced hand loan to the accused. So material witness was the wife of the complainant who is not examined by the complainant to substantiate the said contention. The admissions on the part of the complainant further shows

that there is inconsistency between the oral evidence and the documentary evidence as to the purchase of the stamp is concerned. It is well settled that while considering the application for the leave to file appeal, whether any illegality is committed by the trial Court by ignoring the evidence is required to be seen. On perusal of the impugned judgment it reveals that the trial Court has considered the entire evidence of the complainant as well as the cross-examination and also considered whether the accused succeeded in rebutting the presumption. It is well settled that for the accused to rebut the presumption it is not necessary to adduce the evidence which would prove beyond reasonable doubt that accused is not guilty of the charges, but on the basis of preponderance of probability the accused has to support his defence. During the cross-examination, it came on record that Exh.27 is purchased on 14/03/2016 and not on 13/04/2016. Thereafter it also reveals that it was the wife of the complainant who has given the hand loan to the accused, and therefore, she was the material witness. She is also not examined by the complainant to substantiate the said contention. Thus, the evidence on record sufficiently shows that the complainant failed to establish the foundational facts on record that there was legal and enforceable debt and to discharge the legal and enforceable debt the cheque was issued by the accused and the said cheque was deposited and return with an endorsement “Funds Insufficient”. Thus, burden on the accused is to rebut the presumption on the basis of preponderance of probability which is not on record. On perusal of the impugned judgment I do not find any illegality committed by the concerned Court i.e. the Additional Chief Judicial Magistrate, Nagpur.

9. Considering the fact that the foundational fact itself that the cheque was issued against the discharge of legal and enforceable debt itself is not proved, and therefore, no case is made out for grant of leave. In view of that, application deserves to be rejected.

10. Hence, the application is rejected accordingly.

(URMILA JOSHI-PHALKE, J.)

**Divya*