IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO. 814 OF 2023
IN
CRIMINAL APPEAL STAMP NO. 4890 OF 2023

Sheikh Mustaq Sheikh Latif **Vs** Dilip Shriram Adagale and another.

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

Mr. Vikky Gokhale, counsel with Mr. Pavan Sarise, counsel for applicant.
Ms. T.H.Udeshi, APP for non-applicant/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 17/10/2024.

1. By this application, the applicant is seeking leave to file an appeal against the acquittal.

2. Learned counsel for the applicant submitted that learned trial Court has not considered that the cheque was issued against the legal and enforceable debt and the said cheque was deposited by the complainant, which was returned with the endorsement of 'funds insufficient'. After the notice is issued, the amount was not paid, and thus, the accused has committed the offence under Section 138 of Negotiable Instruments Act, 1881. He invited my attention towards the impugned judgment and submitted that legal and enforceable debt is proved, and the cheque is signed by the non-applicant. Thus, there is ample evidence on record to show that the cheque was issued by the accused, which was deposited, and the legal and enforceable debt was proved.

3. Though the respondent is served, none appears for the respondent. Perused the impugned judgment as well as the complaint, it reveals that the present applicant is the original complainant, who is running the grocery shop. The accused is also running the grocery shop. As per the contention of the complainant in the complaint, on 17/06/2015, the accused approached the complainant and intended to sell his house for the consideration of Rs. 2,10,000/-, and towards the Issar, the complainant has paid Rs. 80,000/- to the accused. Though the accused agreed to execute the sale-deed in favour of the complainant, but he has not executed the sale-deed and thereafter issued a cheque of Rs. 80,000/-. The said cheque was drawn on the bank, i.e. the Central Bank of India. The complainant deposited the said cheque on 10/11/2015, but it was returned with an endorsement of ‘funds insufficient’, therefore notice was issued on 19/11/2015. After service of the notice, the accused has not paid the amount, and therefore complainant constrained to file complaint under Section 138 of Negotiable Instruments Act, 1881.

4. In support of his contention, the complainant has examined himself vide Exhibit No. 64. He has also adduced the documentary evidence, i.e. Issar Pawati, Cheque bearing No. 400087, Cheque returned memo Exhibit No. 33, Debit Advice Exhibit Nos. 35 and 36, legal notice Exhibit No. 37, and Postal acknowledgment Exhibit No. 38. The accused has also adduced his evidence by examining Keshav Rambhau Ingole, Shrikrushna Fulchand Solanke, and Vinaykumar

Madhukar Borade. The defence of the accused is that, prior to depositing the cheque, there was a theft of a blank cheque from his house, and on the next date, the cheque was deposited by the complainant in his account, and the said cheque was dishonored. He has also made a complaint to the police regarding theft of the said cheque. He has also examined Vinaykumar Madhukar Borade to substantiate his evidence that the complainant is running the money lending business without license. The evidence of said Vinaykumar Madhukar Borade, who is serving as a Sub-Registrar Cooperative Society, shows that on the complaint received from the accused, he conducted a raid from the house of the complainant, some objectionable documents as well as the blank cheque bearing no. 400085 was found. Thus, on the basis of the evidence, the trial Court held that the accused has rebutted the presumption, there was no legal and enforceable debt, and the cheque was not issued against the legal and enforceable debt. As the foundational facts are not proved by the complainant and the accused has rebutted the presumption, therefore he is acquitted from the trial.

5. Thus, considering the reasoning mentioned by the trial Court, it appears that, on the basis of the evidence, the trial court has drawn the conclusion that defence of the accused is that complainant is doing the money lending business, which is supported by the evidence. Moreover, the complainant failed to adduce the evidence of cheque, which was issued against legal and enforceable debt, and thereby acquitted the accused. Therefore, I do not find any illegality

committed by the court. The burden is on the accused to prove the defence, discharge, or rebut the presumption on the basis of pre-ponderance of probabilities. The accused has adduced the evidence by examining the Sub-Registrar Cooperative Society, whose evidence specifically shows that the complainant was running the money lending business without license, and a blank cheque bearing No. 400085 is also found in the house of the complainant.

6. Moreover, defence of the accused is supported by the material evidence, and therefore, I do not find any illegality committed by the trial Court. In view of that, no ground is made out to grant the leave, and accordingly, I do not find any merit in the application. Accordingly, I proceed to pass the following order.

The criminal application (APPA) No. 814/2023 is **rejected.**

[**URMILA JOSHI-PHALKE, J.]**