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

CRIMINAL APPLICATION NO.972 OF 2023
IN
CRIMINAL APPEAL (ST.) NO.7108 OF 2023

(Ankit s/o Subashchandra Khatri Vs. Shri Rakesh s/o Siddarth Wasnik)

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

Mr. S.S. Sitani, Advocate for the appellant.

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

Heard.

2. By preferring this appeal, the appellant has challenged the order passed by the Extra Additional Chief Judicial Magistrate, Nagpur in S.C.C. No.6685/2017 by which the accused is acquitted for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881.

3. Learned Counsel for the appellant submitted that the acquittal by the trial Court is on the ground that the amount which was given as a hand-loan was not shown in the income tax return. The another reason assigned by the trial Court is that the defence of the accused that the amount advanced by the complainant is unsecured, and therefore, preponderance of probability to give the blank cheque as a security for repayment of amount advanced by the complainant cannot be ruled out. He submitted that thus the acquittal by the trial Court is on the assumption that the cheque was issued as a

security. In fact, the accused has admitted that he has obtained the loan. Thus, in discharge of the legal and enforceable debt, the cheque was issued by the accused but the learned trial Court has not considered the same and on a flimsy ground, the accused is acquitted. He submitted that, the appellant has many arguable points in the present appeal. In support of his contention, he placed reliance on ***Prakash Madhukarrao Desai Vs. Dattatraya Sheshrao Desai [MANU/MH/3460/2023]*** wherein the Division Bench of this Court observed that the complaint which is otherwise maintainable under Section 138 of the Act of 1881 is not liable to be dismissed at the threshold only on the ground that the complainant had failed to disclose the amount mentioned in the cheque in his Income Tax returns. The presumption under Section 139 of the Act of 1881 being in the nature of an initial statutory presumption in favour of the complainant, it will have to be rebutted by the accused as any other legal presumption. It hardly needs any reiteration that the standard of proof for rebutting such presumption is on the basis of preponderance of probabilities.

4. In the present case also learned trial Court has considered that the amount was not shown in the income tax as well as on assumption that the cheque was issued as a security and the service of notice was not proper. The learned trial Court has not considered that the notice was issued on a given address by the accused. There is a statutory presumption in view of Section 27 of the General

Clauses Act, 1897. Thus, considering the grounds raised by the appellant, there are many arguable points in the present appeal. In view of that, the applicant has made out a case for grant of leave to file an appeal against the acquittal. In view of that, the application is allowed.

5. Leave is granted to file an appeal.

6. The appeal be registered.

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After registration of the appeal, Call for R. & P.

2. Place the appeal for final disposal at the admission stage on receipt of R. & P.

(URMILA JOSHI-PHALKE, J.)

**Divya*