



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

CRIMINAL APPLICATION NO.88 OF 2022

IN

CRIMINAL APPEAL (ST.) NO.8819 OF 2021

(Raju s/o Ramcharan Bariyekar Vs. Jitendrakumar s/o Dikpal Kewat)

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 :- AUGUST 6, 2024.

By this application, the appellant is seeking leave to file appeal.

2. The appellant has challenged the judgment and order of sentence passed by the Judicial Magistrate First Class, Tirora in SCC No.580/2016 by which the present respondent is acquitted for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881.

3. Learned Counsel for the appellant submitted that the trial Court has erroneously held that the complainant has not proved his financial capacity and there is no evidence to show as to the having of so much amount with the complainant in absence of the evidence.

4. He submitted that this observation of the trial Court is contrary to the decision of the Hon'ble Apex Court in the case of *Tedhi Singh Vs. Narayan Dass Mahant*

(2022) 6 SCC 735 wherein the Hon'ble Apex Court held that complainant need not show in first his financial capacity unless accused sets up a case questioning complainant capacity in reply to the statutory notice.

5. He submitted that in paragraph No.9 it is observed by the Hon'ble Apex Court 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, ..xxxx”

6. Thus, he submitted that the observation of the trial Court that the complainant has not produced any evidence to show his economical condition is contrary to the observation of the Hon'ble Apex Court. He further submitted that the appeal would take its own time for its final decision. He pointed out from the impugned

judgement that he has many arguable points in the present appeal.

7. Though notice is served, none appears for the respondent.

8. I have heard learned Counsel for the appellant and perused the impugned judgement from which it reveals that the acquittal is on the ground that the complainant failed to prove his financial capacity. In view of the judgment of the Hon'ble Apex Court, it was the accused who has to set up such a case by producing independent material or by pointing to material produced by the complainant himself or cross-examined the witness. Thus, the learned Counsel for the appellant has made out a ground to grant leave to prefer an appeal against acquittal.

9. In view of that the application is allowed. Leave is granted to the appellant to prefer an appeal.

10. Appeal be registered.

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On registration of the appeal, notice be issued to the respondent, returnable after four weeks.

(URMILA JOSHI-PHALKE, J.)