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

CRIMINAL APPLICATION (APPA) NO. 1007 OF 2022
IN
CRIMINAL APPEAL STAMP NO. 8861 OF 2022

Sanjay Gajanan Dhawas **Vs** Mosin Sayeed Sheikh

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

Mr. K.R. Bhise, counsel h/f Mr. A.A. Dhawas, counsel for the applicant/appellant.
Mr. Ganesh N. Khanzode, counsel for respondent.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 30/09/2024.

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

2. The necessary facts which requires for disposal of the application are as follows:

The complainant has preferred the complaint before the Judicial Magistrate First Class, Warora, on an allegation that he was acquainted with the accused and there was a friendly relationship between them. The accused was in need of financial assistance for the purpose of his business, and therefore, on 11/01/2016, he obtained the hand loan amount from the complainant, and the complainant has withdrawn the same from the State Bank of India, Warora Branch. Thereafter, in January 2016 and February 2016, he has paid Rs. 2,00,000/- and Rs. 1,00,000/-, respectively. Thus, a total amount of Rs. 4,00,000/- was paid by the complainant to the accused. The accused though agreed to pay the amount, but he failed to repay the amount. Therefore, on demand, he has issued a cheque of Rs. 4,00,000/- dated 01/03/2020 drawn on the Central Bank of India, Warora Branch, bearing cheque No. 047191. On depositing the said cheque, the said cheque returned with an endorsement funds insufficient. Therefore, the complainant has issued a notice on 27/05/2020, the said notice was received by the accused on 28/05/2020. But after receipt of notice also, the accused has not repaid the amount. Therefore, the complainant has constrained to file a complaint under Section 138 of the Negotiable Instruments Act, 1881.

3. After adducing the evidence by the complainant and after hearing both sides, the learned trial court acquitted the accused on the ground that the transaction was not proved by the complainant, as it is not proved by the complainant that the cheque was issued against the legal and enforceable debt. The presumption do not attract and acquitted the accused.

4. Being aggrieved and dissatisfied with the same, the present appeal along with leave application is filed.

5. Heard learned counsel for the applicant and learned counsel for the respondent. Learned counsel for the applicant submitted that the cheque was issued against the legal and enforceable debt. The cheque was deposited by the complainant in his account, and after issuance of the notice also, the amount was not paid. Thus, the accused has

committed the offence under Section 138 of the Negotiable Instruments Act, 1881. He submitted that, in support of the said contention, the complainant has examined himself as well as the two witnesses and established that there was legal and enforceable debt and the cheque was issued in discharge of legal and enforceable debt, but the learned trial Court has not considered the same, and on erroneous presumption, the accused was acquitted. He submitted that the appellant has a case on merits and various arguable points in the present appeal. In view of that, leave is to be granted to the present appellant to file an appeal.

6. Learned counsel for the respondent strongly opposed the said application and submitted that the accused has discharged his burden on the basis of the cross-examination, and the witnesses examined by the complainant itself show that there was no legal and enforceable debt proved by the complainant, and therefore, the learned trial Court has rightly acquitted the accused. In view of that, the application deserves to be rejected.

7. Heard both sides. Perused the evidence on record, from which it reveals that the transaction between the complainant and the accused is of a hand loan. During the evidence, the complainant has examined two witnesses, namely Wasudeo Bapurao Wakade and Kawadu @ Rama Nilkanth Khandekar. As per the evidence of the complainant, the entire transaction took place in the presence of these witnesses. During cross-examination, these witnesses specifically admitted that they were not aware that on each

date, the cheque was issued. They were also not aware regarding the transaction between the complainant and the present accused. The best evidence available with the complainant was to examine the bank witness to show that he has withdrawn the amount from the bank and thereafter handed it over to the accused, but this bank witness is not examined. Statement of the bank was also produced on record to show that he has withdrawn the amount, and thereafter the amount was paid as a hand loan.

8. The learned trial Court has rightly considered these aspects in para-20 and observed that the witnesses who are examined by the complainant are not aware about the nature of the transaction between the complainant and the accused. It is further observed that the complainant has also not adduced the evidence to show that there was sufficient amount in his account lying, and he has withdrawn the amount from the bank and thereafter handed over the same. Thus, foundational facts are itself are not proved by the complainant, and therefore, presumption will not attract against the accused. He further observes that considering the above evidence on record, which sufficiently shows that the presumption will not attract as the foundational facts itself are not proved by the complainant and acquitted the accused.

9. Considering the observations of the trial Court, it reveals that the transaction between the complainant and the accused was of a hand loan. As far as the contention of the complainant is concerned, which shows that he has

withdrawn the amount from his bank and thereafter handed it over to the accused. As far as the handing over of the amount is concerned, there is absolutely no evidence, except the bare words of the complainant. The best evidence available with the complainant was produced on record, either the statement of the account or the genuine witness, which is not adduced by the complainant.

10. Thus, the foundational fact that there was a legal and enforceable debt and out of that legal and enforceable debt, the cheque was issued itself, is not established by the complainant, and therefore, the presumption will not attract in favor of the complainant. It is also well settled that the accused can rebut the presumption on the basis of preponderance of probabilities. The burden on the accused is not to prove the facts beyond a reasonable doubt. On the basis of the cross-examination, he has rebutted the said presumption.

11. Thus, no grounds are made out to grant a leave to the present applicant to prefer an appeal. In view of that, the application for grant of leave deserves to be rejected. Accordingly, I proceed to pass the following order;

The criminal application (APPA) No. 1007 of 2022 is hereby **rejected.**

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

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