IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO.98 OF 2024

Anil s/o. Ramesh Choudhari,
Age : 39 years, Occu. : Business,
Address : 45, Shradha Nagar, Nakane Road,
Deopur, Dhule, Dist. Dhule. **... Applicant**

Versus

1. Rakesh S/o. Deoram Khalane,
Age : 41 years, Occu. : Service,
R/o. Bapusaheb Khalane Ashram School,
Behind Swami Samarth High School,
Sindhkheda, Tq. Sindhkheda, Dist. Dhule,

Alternate Address : 14, Jijai Dhanashri
Colony, Near Bijasani Mangal Karyalay,
C/o. Ravindra Patil, Sindhkheda,
Tq. Sindhkheda, Dist. Dhule. **... Respondent**

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Mrs. Aishwarya C. Deshpande h/f. Mr. C. C. Deshpande, Advocate for Applicant.

Mr. Mehul P. Kulkarni h/f. Mr. Amol S. Sawant, Advocate for Respondent.

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CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 02 JULY 2025
PRONOUNCED ON : 10 JULY 2025

ORDER :

1. Original complainant has pressed into service instant application urging grant of leave to question the judgment and order of acquittal dated 08.05.2024 passed by learned Judicial Magistrate First Class (Court No.3), Dhule in Summary Criminal Case No.70 of 2016.

2. Learned counsel for applicant would point out that, present applicant and respondent (original accused) were friends. That, due to financial crises and financial need, respondent borrowed hand-loan to the tune of Rs.2,00,000/- and assured to repay the same. She would further point out that, only on hot persuasion, respondent issued cheque and assured that it would be honoured, however, when the same was presented for realization, the same was returned dishonoured with remark 'funds insufficient".

3. She would further submitted that, as required under law statutory legal notice was dispatched on both addresses of accused and same were received, but there is failure to repay the cheque amount and so applicant was constrained to initial proceedings under section 138 of the Negotiable Instruments Act.

4. It is further pointed out that apart from his own evidence at Exh.4, reliance was placed on documents like cheque, Bank return memo, copy of notice, postal acknowledgments and case was substantiated. That, accused also appeared, contested and also resisted the claim denying any legally enforceable debt amongst several other grounds. That, evidence of complainant was full-proof, cross of complainant had remained unshaken, in spite of

the same accused has been acquitted. She further took this court through the body of judgment sought to be impugned and would submit that, out of five points which were determined, four were answered in affirmative and only one point was answer in negative. That, learned trial court failed to consider and appreciate the documentary evidence, more particularly the Bank memo in its correct perspective and refused to consider the same for want of mere bank seal/mark. That, there was signature of the Manager, however, it is overlooked and therefore there being good case on merits in appeal, she urges for grant of leave.

5. Learned counsel for respondent while supporting the order of acquittal would point out that, the essential ingredients were missing. That, the very Bank memo, which is the strong and reliable proof of dishonour was itself not proved or exhibited and so, for want of essential requirements and insufficient weak evidence, learned trial court committed no error in acquitting the accused. Learned counsel in support of above contentions placed on record order of this court in the case of ***Vandana W/o. Akhilesh Pandey v. Abhilasha W/o Anil Pande*** reported in 2019 (2) Mh.L.J. 645. Lastly, he referred to settle legal position while interfering in the judgment of acquittal.

6. After considering the cases so advanced before this

court and on going through the impugned judgment sought to be challenged, it transpires that case set up by present applicant was extending friendly hand-loan and receiving cheque from accused respondent toward repayment of the same, however, it getting dishonoured with reason “funds insufficient”. Papers show that, complainant adduced his own evidence and also tendered above referred documents. Accused has also bothered to adduce his own evidence.

7. The fundamental ground raised by respondent accused in the trial court was that he had not issued any cheque in favour of complainant, rather cheque was issued in favour of one Harishchandra Wagh and the same has been misused. Secondly, financial capacity of complainant was also questioned to extend any loan. After going through the judgment, it appears that learned trial court has applied and invoked presumption available under section 139 of Negotiable Instruments Act. However, after discussing various judgments of this court, learned trial court has dealt the documentary evidence, more particularly Bank memo and has noted that Bank seal and Bank mark over it, is missing.

8. Section 146 of N.I. Act deals with requirement of Bank seal over the Bank documents. The said section is reproduced as under :

> *"**146. Bank's slip prima facie evidence of certain facts –***
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> *The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved."*

9. The above provision clearly stipulates essential requirements of official mark on the form of Bank seal over the Bank documents or memo. This is precisely missing in the Exh.6 tendered by the complainant. Apart from necessity of establishing essential ingredients under section 138 of N.I. Act, the requirement of above provision under section 146 is also mandatory. Complainant's case in the trial court is falling short of the same and therefore, learned trial court, in the considered opinion of this court, has not erred in any manner in refusing the prosecution case as proved, as complainant has failed to discharge the primary burden. Therefore, with such quality of evidence, this court does not find any merits in the application for leave and hence, refuses the same. Hence, the following order is passed :-

ORDER

(i) Leave is refused.

(ii) Application is rejected.

(ABHAY S. WAGHWASE, J.)

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