IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.630 OF 2009
IN
CRIMINAL APPEAL (STAMP) NO. 139 OF 2009

Anil s/o Baburao Kataria,
age 42 years, occup.trading,
r/o Shivneri Marg, Station
Road, Ahmednagar, Taluka .. Applicant/
and District Ahmednagar. ori.complainant.

versus

Purshottam s/o Prabhakar Kawane
age 50 years, occup. service,
r/of M.E.S. Colony, Solapur Rd.
Ahmednagar. .. Respondent.

Shri P.S. Pawar, Advocate for applicant.
Shri Amol N.Kanade, Adv. for Respondent.

Coram: P.R. Borkar J.

Date : 21.11.2009.

ORAL JUDGMENT

1. This is an application for leave to file appeal against the judgment and order of acquittal passed by the learned Judicial Magistrate, First Class (1st Court), Ahmednagar in S.T.C. No.3528 of 2005 decided on 11.12.2008.

2. Briefly stated, in or about September-October 2004, present Respondent was in need of financial help and, therefore, he requested the present applicant to give him amount of Rs.4.00 lakhs and assured to repay the same within one or two months. The applicant paid the amount. However, according to the applicant, the respondent failed to repay the amount and therefore demand was raised by applicant pursuant to which the present respondent issued cheque dated 24.5.2005 drawn on Post Office Savings Bank, Ahmednagar Branch, for Rs.2.00 lakhs. On

25.5.2005, the applicant deposited that cheque in the said bank for encashment, but the same was dishonoured on the ground of insufficiency of funds.

3. Thereafter on 4.6.21005, the applicant issued notice to the Respondent calling upon him to pay the amount within fifteen days and since the amount was not paid, the complaint under Section 138 of the Negotiable Instruments Act was filed. The trial court took cognizance of the complaint and issued notice to the present Respondent who then appeared in the matter. The trial was conducted and ultimately the order of acquittal was passed which is sought to be challenged by seeking leave of this court to file appeal.

4. Heard Shri P.S.Pawar, learned Advocate for the applicant and Shri Amol N. Kakade Advocate for the respective parties. Both have taken me through various documents and the judgment of the trial court. The trial court has taken into

consideration the admission given by the applicant in his cross examination that he had filed criminal cases for commission of offence punishable under Section 138 of the Negotiable Instruments Act, against the persons mentioned in paragraph 20 of the judgment. Those persons are (1) Ananda Gahile, (2) Vijay Kale, (3), Rajendra Dake, (4) Vinay Khisti, (5) Shivaji Chaure, (6) Santosh Malwade, (7) Akrur Kaspate, (8) Kanhayalal Rathod, (9) Sachin Joshi and (10) Prakash late.

The applicant denied that the cases involved the amounts total of which is more than Rs.80.00 lakhs.

5. It is argued on behalf of the Respondent that the transactions with so many persons clearly indicate that the transaction with the Respondent was not of a hand loan transaction, but it was a money lending transaction and the complainant/applicant is doing money lending business without licence.

6. In paragraph 16 of the judgment, the learned trial court referred to evidence of DW-1 Premlata Balasaheb Parkhe at Exh.50 who is an employee of the Income-tax Department. She produced income-tax returns of the present applicant at Exhibits 52 and 53 and in paragraph 16 of the judgment, the trial court noted that the total income of the applicant in the year 2002-03 was Rs.60,000/= and for the year 2003-04, it was Rs.57,989/= and it is amply clear that the person having such income could not have lent amount of Rs.4.00 lakhs in lump-sum to the respondent-accused. There is no other documentary evidence led by the complainant to prove that he actually lent Rs.4.00 lakhs. It is the case of present Respondent that he borrowed amounts of Rs.10,000/= and Rs.20,000/= from the applicant and repaid Rs. 50,000/=. However, while giving loan, the applicant-complainant had obtained blank cheques from the respondent and taking advantage of the same, the present case is filed.

7. The trial court has come to the conclusion that the complainant could not have an amount of Rs.4.00 lakhs in lump sum at a time and there is nothing on record that he got some windfall after March 2004 so that he could give loan of Rs.4.00 lakhs at a time to the accused-respondent in September-October 2004. Moreover, it appears from the admission of the complainant in his cross examination referred to above that he is doing money lending business. He admitted to have money transactions with ten persons named which ultimately resulted in their prosecution for offence punishable under Section 138 of the Negotiable Instruments Act.

8. Shri Amol Kakade, learned Counsel for the Respondent has filed affidavit-in-reply and produced xerox copy of criminal M.A. No.16 of 2009 filed by present applicant, whereby he has sought transfer of as many as 60 cases from one court to another. There is no denial of this document. Averments in affidavit in reply and said document clearly shows that the applicant was doing money

lending business and therefore, inference drawn by the trial court cannot be said to be unreasonable, but it is proper inference based on admission before it.

09. Here, I may refer to the provisions of the Bombay Money-Lenders Act, 1946. Section 5 of the said Act lays down that no money lender shall carry on business of money lending except in the area for which he has been granted a licence and except in accordance with the terms and conditions of such licence. It is not the case of present applicant-complainant that he has any money lending licence. Section 10 of the Act lays down that no court shall pass a decree in favour of a money-lender in any suit to which said Act applies unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit. In other words, carrying on money lending business without licence debars a

person from doing money lending and recovering the amount through court. As per explanation to Section 138 of the Negotiable Instruments Act "debt or other liability"means a legally enforceable debt or other liability. So, a loan advanced by a money lender who is doing business of money lending without licence is not a debt or other liability and provisions of Section 138 of the Act will not apply to such transaction. In the light of above, it cannot be said that in the present case, that the cheque issued by the Respondent in favour of the applicant was for the liability enforceable in law.

10. I may also refer to Section 32B(b) of the said Act,which lays down that whoever carries on the business of money-lending at any place without holding a valid licence authorising him to carry on such business at such place, shall, on conviction, be punished for the first offence with imprisonment of either description which may extend to one year or with fine which may extend to rupees one thousand and five hundred or with

both and for the second or subsequent offence, in addition to, or in lieu of, the penalty specified in clause (i) with imprsonment which shall not be less than two years, where such person is not a company, and with fine which shall not be less than rupees five thousand, where such person is a company.

11. In light of facts and circumstances as above, this is not a case wherein application for leave to file appeal can be granted. Hence, application rejected.

pnd/criap630.09 **(P.R.BORKAR, J.)**