

THE HONORABLE HIGH COURT OF JUDICATURE AT BOMBAY.**HUMBLE APPLICATION OF THE APPLICANT**
ABOVENAMED.**MOST RESPECTFULLY SHEWETH:**

- I. The Applicant approaches this Honourable Court with a prayer that this Honourable court may be pleased to exercise its jurisdiction under Section 378(5) of the Code of the Criminal Procedure and be pleased to grant special leave to appeal from the impugned Judgment and Order of acquittal dated 12/2/0000 passed by the Ld. Judicial Magistrate First Class, XXX, in S. C. No. 888 / 0000, whereby the Ld. Magistrate was pleased to acquit the accused/Respondent.

- II. The facts leading to the filing of the present Criminal Application are as under:
 - a) The Applicant i.e. NIMA, MAHB is an Association of Doctors and the said association is registered under Societies Registration Act 1960 having its Registration No. as, 'M.U.M. 000 / 00'. The Applicant states that the applicant has authorized its Secretary to file the present Application for leave to Appeal by a Resolution passed by the Applicant. The Applicant states that Dr. SSN came to be elected to the post of Secretary of the Applicant, in its General Election held on 27/12/0000.

 - b) The Applicant states that prior to the said general election of the applicant held on 27/12/0000, the present accused i.e. the Respondent No. 1 was holding the post as the Treasurer of the applicant. The applicant states that in spite of expiry of his tenure, the accused did not vacate his office and did not handed over the charge of his post to the new elected Treasurer. The

applicant states that in spite of official correspondence, the accused did not handed over the charge to the new Treasurer.

- c)** The applicant states that the Respondent No. 1, during his tenure as Treasurer, by abusing his official position misappropriated huge sum of amount belonging to the applicant. The applicant states that thereafter the accused on 24/6/0000 deposited an amount of Rs.5 Lakhs in the bank account of the applicant, via online transfer. The applicant states that on 8/8/0000 in the General Body Meeting of the applicant, the accused deposited the cash amount of Rs. Twenty Lakhs with the Applicant. The Applicant further states that thereafter the accused gave a demand draft of Rs.5 lakhs to the Applicant. The Applicant states that thus the accused deposited in all total amount of Rs.30 lakhs with the applicant.
- d)** The Applicant states that thereafter in presence of the accused the Auditor of the Applicant, audited the account of the Applicant and as per the report of the auditor an amount of Rs.7,86,000/- was still due and payable, by the accused to the applicant. The Applicant states that apart from the said amount, the interest on the said amount was also due and payable by the accused for a period from August 0000 to November 0000. The applicant thereafter through its Advocate sent a legal notice to the accused and call upon him to pay the said amount of Rs. 7,86,000/- along with the interest thereon till November 0000.
- e)** The Applicant states that thereafter on 21/12/0000, the President of the Applicant, by his letter, call upon the accused to pay an amount of Rs. 7,96,123/- inclusive of interest to the Applicant. The Applicant states that upon receipt of the said letter the accused by his reply dated 22/12/0000

informed the Applicant that the accused is accepting his liability towards the said amount and the accused executed consent deed in favour of the Applicant. The applicant states that the accused in discharge of his said liability, handed over a Cheque of Rs.7,96,123/- dated 24/2/0000 bearing No. 050558, drawn on IDBI Bank, Pune to the Applicant and the accused assured the Applicant that the said Cheque would be honoured on its presentation.

- f) The applicant states that the applicant presented the said Cheque for realization on 24/2/0000; however the said Cheque was dishonoured with the remark, "insufficient funds" and the same was intimated to the Applicant on 26/2/0000, by the bankers of the Applicant. The Applicant states that on 20/3/0000, the Applicant issued demand notice to the Respondent as per Section 138 of Negotiable Instrument Act; however Accused/Respondent failed and neglected to pay the Cheque amount within a period of 15 days, from the receipt of said notice. In the circumstance on 9/5/0000, the Applicant filed complaint under Section 138 of Negotiable Instrument Act, against the Respondent No. 1 before Ld. J.M.F.C., XXX. The Applicant states that all the office bearers of the Applicant i.e. the President, Secretary and the Treasurer had filed the said Complaint on behalf of the Applicant and the Treasurer Mr. SK was duly authorized by the Applicant vide its resolution dated 17/4/0000, for initiating legal action against the accused. The copy of the said complaint in Summary Criminal Case No. 000/0000 is annexed herewith and marked as "**Exhibit – A**" and the copy of the subject Cheque, Cheque Return Memo and Demand Notice and Auditors Report are annexed herewith and marked as "**Exhibit – B Colly**"

- g)** The Ld. Trial Judge after recording verification statement and considering the complaint filed by the Applicant, issued process against the Respondent. The Applicant states that in order to prove its case, the Applicant examined in all four witnesses and the Applicant proved the relevant documents relied upon by the Applicant. The copies of the deposition of the witnesses are annexed herewith and marked as “**Exhibit – C Colly**”.
- h)** The Respondent did not examine any witness in his defense. The Ld. J.M.F.C., after considering the evidence adduced by the Applicant and after hearing both the sides, was pleased to dismiss the Complaint filed by the Applicant and acquitted the Respondent, by the impugned Judgment and Order dated 12/2/0000 passed in Summary Criminal Case No. 888 of 0000. The copy of the said impugned Judgment and Order dated 12/2/0000 passed in Summary Criminal Case No. 888 of 0000 is annexed herewith and marked as “**Exhibit – D**”.
- III.** In the circumstances being aggrieved and dissatisfied by the said impugned Judgment and Order dated 12/2/0000 passed by the Ld. Judicial Magistrate First Class, Solapur in Summary Criminal Case No. 888/0000, the Applicant approaches this Hon’ble Court, on following amongst other grounds which are taken without prejudice to one another :

GROUND

1. That the impugned Order of Dismissal of the Complaint and Acquittal of the accused passed by the Ld. J.M.F.C., Hereto annexed and marked as “**Exhibit – X**” is the copy of the said is illegal, perverse, bad in law and is totally contrary and against the principles of natural justice and principles laid down by the Apex Court and therefore the impugned Order is liable to be set be aside.

2. That the Ld. Trial Judge erred in holding that the complainant failed to prove that the complainant had authorized Dr. K for filing the complaint on the behalf of the complainant.
3. That the Ld. Trial Judge erred in holding that the complainant failed to prove that the accused had issued the subject Cheque from his account in discharge of his legal liability.
4. That the Ld. Trial Judge erred in holding that the complainant failed to prove that the complainant had deposited the said Cheque within a period of six months or within the period of limitation.
5. The Ld. Trial Judge erred in holding that the complainant failed to prove that the said Cheque was dishonoured with the remark, 'insufficient funds'.
6. That the Ld. Trial Judge erred in holding that the complainant failed to prove that the complainant had issued notice in respect of dishonoured Cheque to the accused within the prescribed period.
7. The Ld. Trial Judge erred in holding that the complainant failed to prove that after the receipt of the demand notice, the accused failed and neglected to pay the Cheque amount to the complainant.
8. That the learned trial and ought to have held that the Prosecution Witness No. 1 Mr. K was duly authorized by the Applicant for filing the complaint against the accused in respect of dishonour of said Cheque and a letter duly authorizing the Mr. K i.e. the Treasurer was duly brought on record. The Ld. Trial Judge ought to have considered that the said Complaint was filed by all the three Office bearers of the Applicant i.e. the President, the Secretary and the Treasurer and therefore

the Ld. Trial Judge should not have adopted the hyper technical approach while deciding the case of the applicant.

9. The Ld. Trial Judge ought to have considered that the said letter at Exh. 27 clearly empowers the Treasurer to initiate legal action against the accused for dishonour of the said Cheque and it is settled position that the legal action for dishonour of Cheque is to be taken by filing a Criminal Complaint upon failure of the accused to pay the amount of dishonoured Cheque within 15 days after receipt of notice under Section 138 of Negotiable Instrument Act and therefore the Ld. Trial Judge ought to have held that the language used in the said letter at Exhibit 27 was sufficient to infer that the complainant had duly authorized its Treasurer to file the said complaint against the Accused.
10. That the Ld. Trial Judge ought to have considered that the said Letter at Exh. 27 specifically refers to the resolution passed by the applicant/complainant in its meeting dated 17th April 0000 and the accused had clearly failed to demonstrate before the Ld. Trial Judge that in the said meeting no such authorization was given and moreover the credibility of the witnesses examined by the prosecution, was not at all shaken in their cross examination. Therefore considering the overall facts and circumstances of the case the Ld. Trial Judge ought to have held that the said complaint was filed on behalf of the complainant by a duly authorized person i.e. the Treasurer.
11. That the Ld. Trial Judge ought to have consider that the authority of the Dr. K to file the said complaint was not at all challenged by the accused during the cross examination of the PW 1 i.e. Dr. K or any other witness examined on behalf of the applicant/complainant and even the evidence given by the PW 1 to that effect was not even denied by the accused during cross examination and as

such there was no occasion for the Ld. Trial Judge to held that the PW 1 Dr. K was not authorized complainant failed to the said complaint.

12. That the Ld. Trial Judge ought to have considered that the Cheque return memo at Exh. 33, was issued by the bankers of the complainant upon dishonour of the subject Cheque, in its official course of business and therefore merely on the ground that the said Cheque Return Memo was not bearing stamp of the concern bank, the Ld. Trial Judge ought not to have discarded the said document at Exh. 33.

That apart the Ld. Trial Judge ought to have considered that the notice issued by the applicant in respect of dishonour of the Cheque was not disputed or challenged by the accused and the fact in respect of the dishonoured of the said Cheque has been specifically mentioned in the said demand notice at Exh. 31.

13. That the Ld. Trial Judge ought to have considered that the evidence adduced on behalf of the complainant in respect of dishonour of the said Cheque, was not at all challenged by the accused and therefore the Ld. Trial Judge ought not to have held that the complainant failed to prove the fact in respect of dishonour of the said cheque.
14. That the Ld. Trial Judge erred in holding that the complainant in its demand notice at Exh. 31 has not demanded the amount of dishonoured Cheque 'specifically' and therefore the said notice is defective. The Ld. Trial Judge ought to have considered that the said notice at Exh. 31 specifically refers to the dishonour of the said Cheque of Rs.7,96,123/- and by the said notice at Exh. 31 the same Cheque amount of Rs. 7,96,123/- was demanded and therefore there

was sufficient compliance of the provisions of Section 138 of Negotiable Instrument Act in respect of demand notice.

15. That the Ld. Trial Judge erred in interpreting Section 146 of the Negotiable Instrument Act in its proper perspective and therefore the finding recorded by the Ld. Trial Judge to that effect are illegal, perverse and bad in law.
16. That the Ld. Trial Judge erred in holding that the Applicant / Complainant had not authorized its President, Secretary and Treasurer for issuance of notices under Section 138 to Negotiable Instrument Act and therefore the said notice issued under Section 138 of Negotiable Instrument Act was not valid.
17. That the Ld. Trial Judge ought to have considered that the said notice was given to the accused by the advocate of the complainant upon to instruction given by the President, Secretary, Treasurer and therefore the Ld. Trial Judge ought not to have held that the said person is not authorized by the Complainant for issuance of the notice under Section 138 of the Negotiable Instrument Act.
18. That the Ld. Judge before passing the impugned Judgment, ought to have considered the presumption under Section 139 of the Negotiable Instrument Act, that 'unless the contrary is proved, it shall be presumed that the holder of the Cheque received the Cheque of the nature referred to in Sec. 138 for discharge, in whole or in part, or any debt, or other liability', put burden to disprove the presumption on the Accused and the accused failed to discharge the said burden.
19. That the impugned Order passed by the Ld. J.M.F.C. has caused grave prejudice to the applicant and hence the improper, illegal order of dismissal of

Complaint and acquittal of accused passed by the Ld. J.M.F.C. is liable to be quashed and set aside.

20. That the order of acquittal is palpably erroneous, demonstrably perverse, per se illegal, improper and incorrect and deserves to be set aside.

21. That considering the facts and circumstances of the case it is necessary in the interest of justice to grant special leave to appeal from the impugned order of acquittal.

IV. No other Application is filed by the present Applicant save and except the present Criminal Application regarding the subject matter, either in this Hon'ble Court or in the Hon'ble Supreme Court of India.

V. That the impugned Judgment and Order of Acquittal was passed by the Ld. Judicial Magistrate First Class, Solapur, in Summary Case No. 888 / 0000 on 12/2/0000. The Application for obtaining Certified Copy was made on 13/2/0000 and same was ready and received by the Applicant on 21/2/0000 and hence there is no delay in filing the present application.

VI. The Applicant craves leave to add, alter or amend any of the ground aforesaid.

The Applicant, therefore pray that: -

a) That this Hon'ble Court may be pleased to grant special leave to the Applicant to Appeal from the Judgment and Order of Acquittal dated 12/2/0000 passed by the Ld. Judicial Magistrate First Class, XXX in Summary Criminal Case No. 888 / 0000;

- b) That the impugned Judgment and Order of Acquittal dated 12/2/0000 passed by the Ld. Judicial Magistrate First Class, Solapur in Summary Criminal Case No. 888 / 0000, may pleased be quashed and set aside and the accused/Respondent be convicted for having committed an offence u/s. 138 of Negotiable Instrument Act;
- c) Any other order in the interest of justice may kindly be passed.

AND FOR WHICH ACT OF KINDNESS AND JUSTICE THE APPLICANT SHALL IN DUTY BOUND EVER PRAY.

MUMBAI
DATE 15/ 4/ 0000

NIMA, MAHB
Through its Secretary
Dr. SSN

Advocate of the Applicant

VERIFICATION

I Dr. SSN, Age Years, the Secretary of the Applicant i.e. NIMA, MAHB the Applicant above named, do hereby states on solemn affirmation that whatever stated in above mentioned paragraphs is true and correct to my own knowledge and I believe the same to be true and correct.

Solemnly affirmed at Mumbai

DATE 15/ 4/ 0000

NIMA, MAHB
Through its Secretary
SSN
BEFORE ME

Identified & Explained by me.

Mr. Shreekant V. Gavand
Advocate for the Applicant.