

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/CRIMINAL MISC.APPLICATION NO. 5695 of 2023
In R/CRIMINAL APPEAL NO. 799 of 2023**

**With
R/CRIMINAL APPEAL NO. 799 of 2023**

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**DHARMESHBHAI JITENDRABHAI SOPARIVALA
Versus
ASHOKKUMAR BALKRUSHNA JARIVALA**

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Appearance:

MR HARDIK A DAVE(3764) for the Applicant(s) No. 1
MR DHARMESH R PATEL(5592) for the Respondent(s) No. 1
Ms. C M Shah, Addl. PUBLIC PROSECUTOR for the Respondent(s) No.
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CORAM:HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 10/08/2023

ORAL ORDER

1.0. Heard Mr. Hardik Dave, learned advocate for the applicant – original complainant and Mr. Dharmesh Patel, learned advocate for the respondent no.1- original accused.

2.0. This application is filed under Section 378(4) of the Code of Criminal Procedure seeking leave to prefer the appeal against the impugned judgment and order of acquittal dated 12.1.2023 passed by the learned Additional Chief Judicial Magistrate, Surat in Criminal Case No.22204 of 2019. By the said judgment and order, the learned Magistrate has proceeded to record the acquittal of the present respondent no.1- original accused for the offences punishable under Section 138 of the Negotiable Instruments Act.

3.0. Learned advocate for the applicant has invited attention of this Court to the reasons assigned by the learned Mamlatdar and has submitted that principally on the ground of financial capacity of the complainant, the learned Magistrate has not entertained the complaint and has recorded acquittal of present respondent no.1- original accused. The attention of this Court is invited to the relevant documents, more particularly, reply given by the respondent-accused to the legal notice of the original complainant under Section 138 of the Negotiable Instruments Act. It is further submitted that except for bare denial, no defence has been raised by the respondent-accused at the very first instance with regard to the financial capacity of the original complainant. Learned advocate has relied upon the decision of the Hon'ble Supreme Court in the case of **Tedi Singh vs. Narayan Dass Mahant** reported in **2022 Live Law (SC) 275** and has urged this Court that an arguable case is made out and leave to appeal be granted.

4.0. On the other hand, learned advocate for the respondent has vehemently objected to grant of leave to appeal. Learned advocate has placed on record the copy of the alleged agreement produced by the original complainant before the learned trial Court vide Exh.10. Learned advocate has invited attention of this Court to the recitals of the said agreement. It is submitted that believing that such agreement was executed between the parties and that even as per the recitals of the aforesaid agreement, blank cheque was furnished as security towards so called amount of Rs.8 lakhs, one of the condition incorporated in the agreement is that aforesaid amount was to be repaid by August

2019. It is further submitted that as against the aforesaid so called amount, cheque which was presented for realization on 24.4.2019 and bears an amount of Rs.10 lakhs. No cogent material has been brought on record by the complainant to establish the fact that an amount of Rs.10 lakhs was advanced. It is submitted that before expiry of the period i.e. August 2019, the security cheque was presented which would not attract Section 138 of the Negotiable Instruments Act. The attention of this Court is also invited to the reasons assigned by the learned Magistrate while appreciating the aforesaid evidence.

5.0. Having heard the learned advocates for the respective parties and having perused the impugned order as well as documents which have been placed for consideration of this Court, *prima facie*, the Court finds that appeal deserves admission and an arguable case is made out, which requires close scrutiny of the evidence. Hence, the present application is allowed and Leave to Appeal, as prayed for, is hereby granted.

Oder in Criminal Appeal

Admit. Appeal be expedited. Learned Additional Public Prosecutor waives service of admission on behalf of respondent State and Mr.Patel, learned advocate waives service of admission on behalf of the respondent no.1. Registry is directed to call for the Record and Proceedings of the case from the concerned Court.

(NISHA M. THAKORE,J)

KAUSHIK J. RATHOD