

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 5693 of 2023

In R/CRIMINAL APPEAL NO. 797 of 2023

**With
R/CRIMINAL APPEAL NO. 797 of 2023**

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**DHARMESHBHAI JITENDRABHAI SOPARIVALA
Versus
MADHUSUDAN JAYANTILAL JARIVALA**

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Appearance:

MR HARDIK A DAVE(3764) for the Applicant(s) No. 1

K T BELADIYA(9101) for the Respondent(s) No. 1

MR HARDIK MEHTA ADDL. PUBLIC PROSECUTOR for the Respondent(s)
No. 2

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CORAM:HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 19/07/2023

ORAL ORDER

1. Rule. Learned advocate Mr. Beladiya, learned advocate waives service of Rule on behalf of the respondent No.1 – original accused and learned APP waives service of Rule on behalf of the respondent No.2 – State.

2. This application is under Section 378(4) of the Code of Criminal Procedure seeking leave to appeal against the judgment and order dated 23.11.2022 passed by the learned Additional Chief Judicial Magistrate, Surat, in Criminal Case No.12421 of 2020. By the said judgment and order, the learned Magistrate has proceeded to record the acquittal of the respondent No.1 – original accused for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. Mr. Dave, learned advocate has drawn attention of this Court to the reasons assigned by the learned Magistrate in recording the order of the acquittal. He has submitted that the learned Magistrate has dismissed the complaint mainly on the ground that the applicant has failed to prove his capacity to lend an amount of Rs.10 Lakhs to the respondent No.1 – accused. He has referred to the defence raised by the respondent – accused as reflected in his statement recorded under Section 313 of Cr.P.C. and has submitted that the defence raised by the respondent – accused is self contrary. He emphasized on the fact that at one stage, the accused has denied the very existence of transaction, whereas on the other hand, having not denied the signature on the disputed cheque, has taken defence that the blank cheque was given as security cheque, which has been misused. Reliance was placed in the case of ***Tedhi Singh Vs. Narayan Dass Mahant*** reported in ***(2022) 6 Supreme Court Cases 735***. By relying on the principle laid down by the Hon'ble Apex Court on the issue of the financial capacity of the complainant, Mr. Dave, learned advocate has submitted that though the legal notice was duly served upon the respondent accused, he has failed to respond such legal notice. In such circumstances, the learned Magistrate ought not to have permitted the accused to set up the defence at the stage of cross-examination of the complainant. He, therefore, urged this Court to grant leave to appeal.

4. On the other hand, Mr. Beladiya, learned advocate has vehemently objected to grant of leave to appeal. He has submitted that learned Magistrate has given valid reasons for dismissing the complaint. He has emphasized on the fact that the complainant was cross-examined and in absence of any evidence being

brought on record with regard to the lending of amount of Rs.10 Lakhs to the respondent – accused. Learned Magistrate has rightly taken into consideration the aspect of financial capacity of the complainant. It is in these circumstances, that the burden has shifted upon the complainant to prove his case beyond reasonable doubt.

5. Considering the submissions made by the learned advocates appearing for the respective parties, prima facie, this Court finds that an arguable case is made out by the applicant. Hence, present application seeking leave to appeal is hereby granted. Rule is made absolute.

CRIMINAL APPEAL NO.797 of 2023:

ADMIT. Learned advocate Mr. Beladiya, learned advocate waives service of notice of admission on behalf of the respondent No.1 – original accused and learned APP waives service of notice of admission on behalf of the respondent No.2 – State.

Let R & P to be called for.

Y.N. VYAS

(NISHA M. THAKORE,J)