

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION (FOR LEAVE TO APPEAL) NO. 19137
of 2023****In****R/CRIMINAL APPEAL NO. 2483 of 2023****With****R/CRIMINAL APPEAL NO. 2483 of 2023**

=====

BHOGILAL DAHYABHAI MALI**Versus****STATE OF GUJARAT**

=====

Appearance:**MR PARAM R BUCH(5625) for the Applicant(s) No. 1****for the Respondent(s) No. 2****MR. BHARGAV PANDYA, APP for the Respondent(s) No. 1**

=====

CORAM:HONOURABLE MRS. JUSTICE M. K. THAKKER**Date : 03/11/2023****ORAL ORDER****Order in Criminal Misc. Application:**

1. This is an application by the applicant - original complainant under Section 378(4) of the Code of Criminal Procedure, 1973, seeking leave of this Court to present an appeal against the judgment and order of acquittal, passed by the learned Additional Chief Judicial Magistrate, Deesa dated 18.07.2023 in Criminal Case No. 1858 of 2016.

2. Heard, learned advocates appearing for respective parties and perused the impugned judgment and order of the trial Court.

3 Mr.Param Buch, learned advocate for the applicant submits though the presumption which is in favour of the complainant under Section 118 and 139 of the Negotiable

Instrument Act was not rebutted by the respondent-accused while leading the probable defence, the learned trial Court had acquitted the respondent-accused from the charges on the sole ground that the complainant could not prove his case with regard that the disputed cheque was given towards the legally enforceable debt. Mr.Buch, learned advocate further submits that though the amount which was given to the respondent-accused was through the bank transaction and for that the Bank Officer was examined below Exh.52 wherein, it transpires that from the CC limit, the amount of Rs.10,00,000/- were credited in the account of the present respondent No.2 on 15.10.2015.Learned Court had not believed the said evidence on the ground that CC limit was permitted to be used for the business transactions, therefore, transferring the amount from the said account would not be advanced money to the respondent-accused. Though, the signature was not disputed by the respondent-accused and mere defence that the accused and the complainant were cousin brothers and the cheque book which was lying in the cold-storage was misused. It transpires from the judgement that there was no any cross-examination which may lead to the conclusion that probable defence which was raised is true and correct. Mr. Buch, learned advocate further submits that though the complainant have produced the gate-pass and the account details below Exh.27 to 33, the same was not believed on the ground that there is no any signature on the gate-pass. However, the explanation which was offered with regard to not having the signature that as they were relative, on the phone the order was given therefore, the signature was not obtained in the gate -pass,

was not believed by the learned trial Court. The bill which was produced at Exh. 34 with regard to show that the accused were running the shop in the name of Kuldevi Aaloo Bhandar was also not believed on the ground that the name of the owner has not been mentioned in the aforesaid bill. Mr. Buch, learned advocate has further submitted that though the initial burden to rebut the presumption is on the shoulder of the accused, however, without discharging the same, the respondent No.2 was acquitted from the charges.

4. Considering the averments made in the application and submissions made by the learned advocates appearing for the respective parties, this Court finds that there is some arguable case in favour of the applicant, therefore, leave, as prayed for, is granted. This application is allowed.

Order in Criminal Appeal:

1. Appeal is admitted. Learned APP waives service of notice of admission on behalf of respondent No.1 - State.
2. Issue bailable warrant in the sum of Rs.5,000/- (Rupees Five Thousand only) against the respondent - original accused.
3. Record and proceedings be called for from the concerned court.
4. List this matter in serial time.

BEENA SHAH

(M. K. THAKKER,J)