IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

APPLICATION FOR LEAVE TO APPEAL (PVT) NO.213 OF 2014

M/s.Anugrah Stock & Stock & Broking Pvt. Ltd. a Company Incorporated under the Companies Act, 1956 having its registered Office at 5th Floor, Ecospace IT Park, Old Nagardas Road, Andheri (East), Mumbai-400 059 Through their Director Shri.Paresh Kariya ... **Applicant**

V/s.

1. Shri.Parind Sushil Parekh, Adult Indian Inhabitant of Bombay residing at Flat N.201, 2nd Floor, Krishna Baug, 11th Road, Khar (West), Mumbai-400 052.

2. State of Maharashtra ... **Respondents**

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Mr.Ajay Khandhar with Jayant Gaikwad i/b Ajay Khandhar & Co., Advocate for the Applicant.
Mr.Deepak Thakre, APP, for the Respondent/State.

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CORAM : ABHAY M. THIPSAY J.

DATED : 19TH JANUARY, 2015

ORAL ORDER :

1. The applicant had prosecuted the respondent No.1 herein on the allegation of having committed an offence punishable under Section 138 of the Negotiable Instruments Act. The learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai after holding a trial found respondent No.1 not guilty and passed an order of acquittal. The applicant is aggrieved by the said order and is, by the present application, seeking leave to appeal therefrom.

2. I have heard Mr.Ajay Khandhar, the learned counsel for the applicant. With his assistance, I have gone through the application and Annexures thereto, which include a copy of the complaint, a copy of the notes of evidence adduced during the trial and the impugned judgment.

3. For the sake of convenience and clarity, the applicant shall be hereinafter referred to as 'the complainant', while the respondent No.1 as 'the accused'.

3. The complainant - a Company - is a Share and Stock Broker and is a member of the Bombay Stock Exchange. The accused had purchased some shares from the complainant, and had issued various cheques to the complainant towards the

payment of the outstanding debit amount in respect of the purchase of the said shares. The complaint had been filed in respect of two such cheques; one in the sum of Rs.10,20,657/- and the other in respect of Rs.36,00,000/- both dated 30/08/2011 drawn on ICICI Bank Ltd. and payable to the complainant.

4. The learned Magistrate, in the impugned judgment, observed that the complainant had sold the shares purchased by the accused apparently for the reason that payment therefor was not coming, and had thus, recovered certain amount that was due and payable by the accused. The Magistrate was of the view that, in such circumstances, it was necessary for the complainant to have given the details of the amount that had been realized from the sale of the shares without which the existence of a liability to the extent of the amount of the said cheques could not be ascertained. Taking this view of the matter, the Magistrate doubted whether the cheques in question could be said to have been issued towards the discharge of the outstanding liability and passed an order of acquittal.

5. The complainant's witness had admitted in the cross-examination that only one transaction through the complainant was done by the accused i.e. purchase of 12,50,000 shares of S. V. Electricals having value per share at Rs.17.50 Ps. The Magistrate also observed that, admittedly, the complainant had started selling

the share from 05/09/2011, though the accused had not given any instructions for selling the same. Perhaps, it is because of these observations reflected in paragraph 14 of the impugned judgment, the learned counsel for the complainant submitted that the complainant had every right and justification for selling the said shares. He submitted that the payment therefor was not forthcoming and the price of the share of the said company was falling down. In my opinion, it is not necessary to go into the question as to whether the sale of the shares by the complainant was justified, but even on the footing that it was justified, no case was made out for interfering with the impugned judgment as passed by the learned Magistrate, inter alia, for the following reasons.

6. Admittedly, the complaint had been filed with respect to the cheques that had been presented for payment at one and the same date. The demand notice in respect of both the said cheques was made even by a single demand notice. The learned counsel for the applicant fairly submits that the total amount of these cheques i.e. Rs.46,20,657/- was <u>not</u> due and payable to the complainant by the accused, and only an amount of Rs.21,81,843/- was due and payable on the relevant date. He himself points out that even in the demand notice, this fact was mentioned.

7. The learned counsel counsel for the complainant submitted that even though only an amount of Rs.21,81,843/- was due and payable by the accused to the complainant on the given date, and even though the total amount of the two cheques in question was Rs.46,20,657/-, still, the acquittal of the accused as recorded by the Magistrate is not proper and legal. According to him, even if the amount of cheque would exceed the amount of the debt or liability to be discharged by the drawer, still the offence punishable under Section 138 of the Negotiable Instruments Act would take place. In view of this submission, he was specifically asked about it by giving an example, so as to have clarity about the proposition canvassed by him. He was asked that if 'A' owes Rs.1,000/- to 'B' and issues a cheque in the sum of Rs.2,000/- which gets dishonoured, then, whether 'A' would still be guilty of an offence punishable under Section 138 of the Negotiable Instruments Act; and according to him, even in such a case 'B' can successfully prosecute 'A' with respect to offence punishable under Section 138 of the Negotiable Instruments Act. It may be observed that such a contention, being contrary to law, deserves to be discarded without any elaborate comment.

8. The learned counsel for the complainant then submitted that since the amount due and payable in this case was Rs.21,81,843/-, at least with respect to the cheque in the sum of Rs.10,000/-, the acquittal was not proper. He submitted that the

amount of *that* cheque was – at least – due and payable. It is impossible to agree with the learned counsel for the complainant. In the first place, both the cheques have been treated as one, deposited together and a common demand notice had been issued in respect of the same. The complaint was also a common complaint for the dishounour of both the cheques. Apart from this, what is significant is that by the demand notice, the complainant had demanded the amount of **both the cheques** from the accused. This was in spite of knowing that the amount of both the cheques taken together exceeded the amount that was due and payable by the accused accused to the complainant. In fact, it is quite interesting to note that the notice of demand mentioned that the accused would have to pay whole amount 'though it was not due', and 'the complainant would refund the excess amount forthwith after adjusting the amount due and payable'. Naturally, in my opinion, the accused was not obliged to comply with such a demand notice.

9. The view of the Magistrate that considering the nature of transaction, the complainant was obliged to give the details of the account, to show how much amount was due and payable, appears to be correct and legal. It is obvious that the complainant was not interested in giving these details - in as much as, they do not find a place in the complaint, - because the accounts would immediately show that an amount of Rs.46,20,657/- was not due

and payable at all, and only an amount of Rs.21,81,843/- was due and payable. The bifurcation of the two cheques, as is now sought to be done by the complainant, was not done before the trial Court. Thus, apart from the reasons mentioned by the Magistrate, it might also be observed that the demand notice being defective and admittedly, issued for an amount much more than that what is *now* stated to be due and payable, the acquittal of the accused cannot be faulted with.

10. The impugned order of acquittal is proper and legal. No interference is warranted.

11. Leave refused.

12. The application is rejected.

(ABHAY M. THIPSAY J.)