IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION (FOR LEAVE TO APPEAL) NO. 17303 of 2023

In F/CRIMINAL APPEAL NO. 34842 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MRS. JUSTICE M. K. THAKKER

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	Yes

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KAMLESH SUNDARDAS HEMNANI
Versus
STATE OF GUJARAT & ANR.

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Appearance:
MR. R.D.KINARIWALA(6146) for the Applicant(s) No. 1
for the Respondent(s) No. 2
MS.VRUNDA SHAH ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 1

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CORAM:**HONOURABLE MRS. JUSTICE M. K. THAKKER**

Date : 08/05/2024

ORAL JUDGMENT

1. This application for seeking leave to prefer an appeal is filed by the applicant-original complainant seeking leave

to prefer an appeal challenging the judgment and order dated 22-08-2024 passed by the learned 18th Aditional Chief Judicial Magistrate, Surat in criminal case No.26623 of 2020 passed below Exh.37 whereby the respondent-accused was acquitted for an offence punishable under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "N.I. Act").

2. It is the case of the complainant in the complaint that the complainant is proprietor of Sai Jyot Fab and Bharati Fashion and knew the accused as they belonged to the same community. The complainant was offered partnership in the firm Nuboks Homes of the accused namely Dev Rajendra Sehejwani proprietor and for that the complainant has transferred the amount of Rs.2,00,000/- each on three occasions through NEFT in the account maintained with the SBI, Vesu Branch, likewise the other two transactions through NEFT for Rs.2,00,000/- each was also made in the account of the accused. Thereafter 3 cheques of Rs.50,000/- each was transfered in the account of Akash Textile and given the cash in part Rs.2,00,000/- in the year 2017.

2.1. The complainant has further given the amount of Rs.9,00,000/- in three parts of each Rs.3,00,000/- to the father of the accused namely Rajendra Sehejwani. The assurance was given by the accused that the partnership deed would be prepared and would be produced before the bank as well as at the relevant places. Upto year 2017-18 no such partnership deed was prepared and during this period the accused withdrawn the amount of Rs.80,00,000/- from the brother's account through Deepsha. Thereafter without the consent, the maternal uncle of the accused was joined as partner for which the objection was raised by the complainant.

2.2. The complainant ultimately had demanded the amount which was invested and to retire from the partnership firm. To repay the amount three cheques bearing No.602252, 602253 and 602255 amounting to Rs.4,00,000/-, Rs.6,00,000/- and Rs.6,00,000/- respectively were issued in favour of the proprietorship firm namely Sai Jyot Fab, out of those, cheques No. 1 and 2 deposited in Sai Jyot Fab returned with an

endorsement of “funds insufficient” and No.3 was deposited in Bharti Fashion which returned with an endorsement of “payment stopped by drawer”. Therefore, after following the due procedure under the law, a private came to be filed before the competent court.

2.3. On recording the verification, the summons came to be issued under section 204 of the Criminal Procedure Code, 1973 (hereinafter referred to as the “Cr.P.C.”) where the accused appeared and pleaded not guilty and claimed to be tried. To prove the guilt of the accused, the complainant has produced 10 documentary evidences and has examined himself below Exh.4 and Ashok Panjumal Lalwani below Exh.33. On filing the closing pursis, further statement under section 313 came to be recorded wherein, the accused pleaded that no documentary evidence was produced regarding lending of amount, the false complaints were filed by altering the cheque and there was no legally enforceable debt established by the complainant qua the respondent-accused.

3. After considering the evidence placed on record and the arguments advanced by learned advocate for the respective parties, the learned trial court has acquitted the respondent-accused which is the subject matter of present leave to prefer an appeal.

4. Heard learned advocate Mr.Kinariwala and as no notice was issued to the respondent-accused, therefore respondent was not heard.

4.1. Learned advocate Mr.Kinariwala submits that respondent-accused fails to rebut the presumption which is in favour of the complainant and dislodge the signature on the cheque, however learned trial court shifted the onus on the complainant to prove his case beyond reasonable doubt. Learned advocate Mr.Kinariwala submits that the judgment and order of acquittal was passed mainly on the ground that though two different firms cheques were returned only a single complaint is filed and the complainant did not establish his case by producing the documentary evidence with regard to the proprietor of Bharti Fashion.

4.2. Learned advocate Mr.Kinariwala submits that infact, the proprietor of Bharti Fashion is father of the complainant and the complainant is authorized signatory in the said Bharti Fashion, however, without considering the said aspect, learned trial court has acquitted the respondent-accused. Learned advocate Mr.Kinariwala submits that without any cogent reasons the judgment and order of the acquittal is passed and therefore leave is to be granted and appeal is required to be admitted.

5. Considering the arguments advanced by the learned advocates as well as perusing the record and proceedings, it transpires from the record that complainant, during his cross-examination, admitted certain facts that complainant is not proprietor of Bharti fashion, he is the authorized signatory and there were no powers given by the father with regard to Bharti Fashion. However, he is doing all transactions in the capacity of authorized signatory in the said Bharti Fashion.

6. At this stage, the judgment passed by the Hon’ble Apex Court in the case of **Milind Shripad Chandurkar vs**

Kalim M.Khan & Anr reported in (2011) 4 SCC 275

is required to be re-looked wherein it is held as under:

> *"21. This Court in Shankar Finance and Investments v. State of Andhra Pradesh & Ors., (2008) 8 SCC 536, dealt with the issue involved herein elaborately and held that where the "payee" is a proprietary concern the complaint can be filed (i) by the proprietor of the proprietary concern describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern describing itself as the sole proprietary concern represented by its proprietor; and (iii) the proprietor or the proprietary concern represented by the Attorney Holder under the power of attorney executed by the sole proprietor.*
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> *However, it shall not be permissible for an Attorney Holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal.*
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> *22. In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the Act 1881 but the case shall be governed by the general law i.e. the Companies Act 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.*
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> *23. This Court in Shankar Finance Case placing reliance on earlier judgments, particularly, in Janki Vashdeo Bhojwani v. Indusind Bank Ltd., (2005) 2 SCC 217, held that the general principles of company law or civil law would apply for*

maintaining the complaint under Section 138 of the Act 1881.

24. In National small Industries Corporation Ltd. v. State (NCT of Delhi) & Ors., (2009) 1 SCC 407, this Court held as under:

"*The term "complainant" is not defined under the Code. Section 142 of the NI Act requires a complaint under Section 138 of that Act to be made by the payee (or by the holder in due course).*"

25. Thus, in view of the above, the law stands crystallised to the effect that a person can maintain a complaint provided he is either a "payee" or "holder in due course" of the cheque.

26. In the instant case, it is evident that the firm, namely, Vijaya Automobiles, has been the payee and that the appellant cannot claim to be the payee of the cheque, nor can he be the holder in due course, unless he establishes that the cheques had been issued to him or in his favour or that he is the sole proprietor of the concern and being so, he could also be payee himself and thus, entitled to make the complaint. The appellant miserably failed to prove any nexus or connection by adducing any evidence, whatsoever, worth the name with the said firm, namely, Vijaya Automobiles. Mere statement in the affidavit in this regard, is not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm.

27. It is evident that the firm had a substantial amount of business as in one month it sold the diesel to respondent no. 1 - a single party, for a sum of Rs. 7 lakhs. The appellant would, in addition, have also been carrying out business with other persons. Thus, a person with such a big business must have had transactions with the bank and must have been a payee of income tax, sales tax etc. Thus, in such a fact-

situation, there would be no dearth of material which could have been produced by the appellant to show that he was the sole proprietor of the said firm. The appellant failed to adduce any evidence in this regard, nor made any attempt to adduce any additional evidence at the appellate stage, in spite of the fact that the respondent is raising this issue from the initiation of the proceedings."

7. In the instant case, it transpires that complainant did not produce any evidence to show that either he is proprietor or Power of Attorney holder or authorized signatory. Therefore, learned trial court has rightly disbelieved the case of the complainant and acquitted the respondent-accused in absence of the material on record.

8. The learned trial court has further discussed the evidence on record wherein, during cross-examination the complainant has admitted that there were no documents produced to show that amount was transferred in the account of accused through NEFT. In addition to that, during the evidence of the witness namely Ashok Panjumal Lalwani Exh.33, it comes on the record that the transactions were with regard to the payment of goods and not with regard to the investment in the partnership firm as stated in the complaint. The presumption which is

provided under section 118 and 139 of the N.I.Act is rebuttable presumption and when the accused successfully established his case, either during cross-examination by creating circumstances or through an independent evidence which may be in the standard of preponderance of probability then again, onus would be shifted on the complainant to prove his case beyond reasonable doubt.

8.1. The phrase burden of proof has two meanings (I) the burden of proof as a matter of law and pleadings and (ii) the burden of establishing case, the formal is a fixed as a question of law on the basis of pleadings and is unchanged during the entire trial whereas the later is not constant but shifts as soon as party adduces sufficient evidence to raise the presumption in his favour. The evidence required to shift the burden need not necessarily be a direct evidence i.e. oral or documentary evidence or admission made by opposite party, it may comprise circumstantial evidence or presumption of law or fact. The burden initially raised on the plaintiff who has to prove that the promissory

note was executed by the defendant. As soon as the execution of the promissory note is proved the rule of presumption laid down in section 118 of the NI Act, helps him tp shift the burden on the other side. The burden of proof as a question of law raised, therefore on the plaintiff, but as soon as the execution is proved section 118 of the NI Act imposes a duty on the Court to raise presumption in his favour that the said instrument was made for consideration.

8.2. In view of the presumption provided under section 118 and 139 of the NI Act, defendant can rebutt such presumption either by direct evidence or by circumstantial evidence. The presumption both under section 118 and 139 of the NI Act are rebutable in nature. For rebutting such presumption what is needed is to raise probable defence. Even for the said purpose the evidence adduced on behalf of the complainant could be relied upon. It is not necessary for defendant to disprove the existence of consideration by way of direct evidence.

8.3. Therefore the accused in the instant case had successfully raised the probable defence and same

was established from the evidence placed on record by the complainant himself.

9. Learned trial court while acquitting the respondent-accused assigned detailed reasons and this Court did not find any infirmity or perversity in the impugned judgment and order of acquittal. Therefore, application for seeking leave to prefer an appeal is declined. Hence, this application is disposed of.

ORDER IN F/CRIMINAL APPEAL NO.34842 of 2023

In view of the dismissal of Criminal Misc. Application No.17303 of 2023 for seeking leave to prefer an appeal, the registration of the Criminal Appeal is also refused.

(M. K. THAKKER,J)

NIVYA A. NAIR