

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/CRIMINAL MISC.APPLICATION NO. 6567 of 2023**

**In R/CRIMINAL APPEAL NO. 925 of 2023**

**With  
R/CRIMINAL APPEAL NO. 925 of 2023**

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**YOGENDRAKUMAR DINDAYAL DHOOT**

**Versus**

**MANISH KISAN BINANI**

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**Appearance:**

**MR ANIK E SHAIKH(10873) for the Applicant(s) No. 1**

**MR SATYAJIT SEN(731) for the Applicant(s) No. 1**

**for the Respondent(s) No. 1**

**MS. C.M. SHAH, APP for the Respondent(s) No. 3**

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**CORAM:HONOURABLE MS. JUSTICE NISHA M. THAKORE**

**Date : 25/04/2023**

**ORAL ORDER**

**ORDER IN R/CRIMINAL MISC.APPLICATION NO. 6567 of 2023**

1. Heard Mr. Anik E. Shaikh, learned advocate on record for the applicant-original complainant.
2. Rule returnable forthwith. Learned APP waives service of notice of rule for and on behalf of respondent-State.
3. This application is filed under Section 378(4) of Cr.P.C., 1973, seeking leave to challenge the judgment and order dated 15.02.2023 passed by the learned Special Metropolitan Magistrate, N.I. Act Court, Ahmedabad in Criminal Case No.1577 of 2015. By the said judgment

and order, the learned trial court has proceeded to record the order of acquittal of respondent No.1 for the offence punishable under Section 138 of the N.I. Act.

4. At the outset, Mr. Anik E. Shaikh, learned advocate on record for the applicant-original complainant, has invited attention of this Court to the fact that the original complaint came to be dismissed against the original accused No.2, who has been joined as respondent No.2 pursuant to the order passed below Exh.1 under Section 203 of Cr.P.C. He therefore, prays this Court that the name of respondent No.2 be deleted from the record of present appeal.

5. Permission, as sought for, stands granted. Respondent No.2 be deleted from the cause title. Let necessary amendment be carried out in the record forthwith.

6. Mr. Anik E. Shaikh, learned advocate on record for the applicant-original complainant, has further invited attention of this Court to the findings recorded by the learned Magistrate while recording the impugned order of acquittal of respondent No.1. He has submitted that the original complainant and the respondents having family relations and were known to each other as respondent No.1 and original accused No.2, who happens to be the cousin brother-in-law to the applicant. Respondent No.1 is engaged in the business of

event management and original accused No.2 is engaged in the business of share trading. It is the case of the complainant that the respondents have approached the applicant seeking financial help for running business. The applicant had trusted the respondents as being family members and had lent an amount of Rs.14,80,000/- to respondent No.1 on various dates. It is contended that the respondents have assured the applicant to make good the payment. The supporting documents in the nature of promissory notes executed by the respondent No.1 on 10.12.2012 for an amount of Rs.3 Lakhs, on 12.12.2012 for an amount of Rs.2 Lakhs and on 13.12.2012, for an amount of Rs.1 Lakh, have been brought on record as Exhs.12,13 and 14 respectively. He has further submitted that at one stage, the learned Magistrate upon appreciation of the aforesaid documents, has arrived at a conclusion that the complainant has been able to establish the existence of legal debt between the parties. However, on the other hand, the learned trial court has erroneously proceeded to call upon the complainant to establish his financial capacity and thereby dismissing the complaint. He has further relied upon the decision of the Hon'ble Apex Court in the case of ***M/s. Kalamani Tex & Anr. Vs P. Balasubramanian delivered in Criminal Appeal No. 123 of 2021 (arising out of Special Leave Petition (Crl.) No. 1876 of 2018)*** and has submitted that once the signature on the

disputed cheque was not contradicted by the accused, the statutory presumption was available in favour of the complainant. In such circumstances, the learned trial court failed to appreciate that the reverse onus clause had become operative and the obligation has shifted upon the accused to discharge the presumption imposed upon him. He has further submitted that in absence of any reply to the legal notice, the learned trial court ought not to have proceeded to record the order of acquittal on the ground of financial capacity of the complainant. He therefore, urged this Court to grant leave to appeal.

7. Having heard the learned advocate on record for the applicant and considering the grounds raised in the memo of appeal, *prima facie*, the Court finds that the approach of learned Magistrate in shifting the burden upon the complainant to prove his case beyond reasonable doubt is not proper when the accused has chosen not to question the financial capacity of complainant at very first instance by not replying to the statutory notice. The statutory presumption drawn under Section 139 of the N.I. Act continued and it was for the accused to discharge the onus by bringing on record such facts to show the preponderance of probabilities about non-existence of such legal debt between the parties. Hence, the present application for leave to appeal requires consideration and the same is **allowed**. Rule is made absolute.

**ORDER IN R/CRIMINAL APPEAL NO. 925 of 2023**

1. ***ADMIT.***
2. Learned APP waives service of notice of admission for and on behalf of respondent-State.
3. Issue bailable warrant in the sum of Rs.10,000/- upon respondent No.1-accused.
4. Registry is directed to call for record and proceedings from the concerned court forthwith. Appeal is expedited.

SUYASH SRIVASTAVA

**(NISHA M. THAKORE,J)**