IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL APPEAL NO. 25 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE A.G.URAIZEE

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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 ?	No
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 ?	No

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JITENDRA CHIMANLAL PARIKH POA HOLDER OF SMT. RADHIKA
Versus
JAYESH PURUSHOTTAM SANGHAVI

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Appearance:
MR JAGDISH M SHAH for the PETITIONER(s) No. 1
MR MJ BUDDHBHATTI for the RESPONDENT(s) No. 1
MS HANSA PUNANI, APP for the RESPONDENT(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE A.G.URAIZEE**

Date : 18/01/2017

ORAL JUDGMENT

1. This Appeal under section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as " the Code" for short) is preferred to challenge the judgment and order of acquittal dated 21.11.2005 passed by Judicial Magistrate First Class, Balasinor in Criminal Case No 601/2000 whereby the respondent no.1 is acquitted for the offences punishable under section 138 of the Negotiable Instruments Act (for short the "N.I Act") instituted by the present appellant.

2. The appellant instituted criminal case No. 601/2000 against the respondent no.1 under section 138 of the N.I Act in the court of learned Judicial Magistrate First Class, Balasinor for dishonour of cheque no.284160 dated 17.7.2000 for Rs.15,000/- drawn on Bank of Baroda, Mangaldas Market Branch, Mumbai branch for partial repayment of friendly loan taken by respondent no.1 from the wife of the complainant. The cheque was dishonoured on 19.7.2000 when it was presented for clearance on 17.7.2000 with an endorsement "REFER to DRAWER". Statutory notice under section 138 of the N.I Act was served on respondent No.1 He did not make the payment of the cheque despite receipt of the notice. The appellant, therefore, was constrained to file complaint under section 138 of the N.I Act in the Court of learned Judicial Magistrate, First Class, Balasinor. The learned Magistrate after conclusion of the trial and upon hearing learned advocate for the parties acquitted the respondent no.1 on twin grounds namely that the appellant failed to prove that the cheque was given for discharge of his liability of repayment of friendly loan. There is variation in the signature of the wife of the complainant in the notice Exh. 53 and the power of attorney Exh;. 39 executed by her in favour of the appellant.

3. The appellant being aggrieved by and dissatisfied with the impugned judgment and order of acquittal has preferred

present appeal.

4. Mr. Jagdish M. Shah, learned advocate for the appellant is absent when the appeal was called out for hearing.

5. Mr. M.J. Buddhbhatti, learned advocate for respondent no.1 and Ms. Hansa Punani, learned APP for respondent no.2 are present.

6. A complaint on behalf of his wife on the basis of Exh. 49 power of attorney, on the basis of which the complaint was lodged by the appellant. This power of attorney is executed on 20.4.1993. The preamble of power of attorney was lodged by the appellant reveals that it is executed to look after some movable and immovable property which belongs to Smt. Radhika Jitendra Parikh who is the wife of the appellant which she owns in India. It is pertinent to note that some movable and immovables properties are not described in the power of attorney. The appellant, therefore, had authority and power to file the complaint against the respondent no.1 by virtue of this general powers of attorney is moot question.

7. Apart from the maintainability of the complaint on the basis of power of attorney, it emerges from the impugned judgment and record that the appellant instituted the complaint against respondent no1 *inter-alia* stating that the

respondent no.1 issued the disputed cheque in favour of his wife Mrs. R.J Parikh towards "part discharge" of liability of repayment of friendly loan taken by him. In this connection the appellant has stated in his oral evidence Exh. 48 that the respondent no1 was known to him and respondent no.1 had approached him on 15.6.2000 for friendly loan of Rs 15,000/- which was given and respondent no.1 has issued post-dated cheque of Rs 15,000/- on 17.7.2000. Thus, it is very clear that the foundation of the complaint ie respondent no.1 had given cheque in favour of Ms. Radhika J. parikh to discharge part of loan taken from her does not stand and has subsequent notice under section 138 B of N.A Act as given by Ms. Radhika J. Parikh cannot be said to be a notice for demand of the legal dues. On perusal of the notice Exh. 43 also nowhere states that respondent no. 1 had taken friendly loan from said Mrs. R.J. Parikh. Only a bald averment is made in the notice that the disputed cheque was issued towards part discharge of liability without specifying the nature of liability. Under the circumstances, the learned Magistrate has rightly recorded a conclusion that the disputed cheque was not issued towards discharge of legal debt.

8. It further emerges that from the perusal of the impugned judgment, learned Magistrate has noticed variation in the signature of Mrs. Radhika J. Parikh as power of attorney and

Exh. 53 Notice under Section 138 B of the N.I. Act to record the acquittal of the respondents.

9. The scope of the acquittal appeal under Section 378(1)(3) of the Code is limited. The Supreme Court in the case of ***Sadhu Saran Sing v. State of Uttar Pradesh, (2016) 4 SCC 357,*** have explained this court of acquittal appeal in paragraph 20 as under*:*

> *"20. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration fo the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal in Sambasivan v. State of Kerala, (1998) 5 SCC 412 has held:*
> *7. " The principles with regard to the scope of the powers of the appellate Court in an appeal against acquittal, are well settled. The powers of the appellate Court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate Court cannot substitute its view in the place of that of the trial Court. It is only when the approach of the trial Court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate Court can interfere with the order of acquittal."*

10. I am in complete agreement with the findings recorded by the learned trial Judge. I am of the view that the findings and reasons recorded by the learned trial Judge for acquitting the respondent cannot be dubbed as perverse or illegal warranting interference in this appeal.

11. For the foregoing reasons, the appeal fails and is hereby dismissed.

12. R & P is ordered to be remitted to the trial Court forthwith.

(A.G.URAIZEE, J)

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