IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST ACQUITTAL) NO. 2156 of 2019

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SHYAMAL MAHESHBHAI LUNGIWALA PROPRIETOR OF M/S AMBER TRADING COMPANY

Versus

BHARATBHAI HATHIWALA & ANR.

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Appearance:
MR HARSHADRAY A DAVE(3461) for the Appellant(s) No. 1
MS JYOTI BHATT, ADDL. PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 2
RULE SERVED for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK**

Date : 13/10/2026

ORDER

1. The present appeal is filed by the appellant – original complainant under Section 378 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code' for short) / under Section 419 of the Bharatiya Nagrik Suraksha Sanhita, 2023 (hereinafter referred to as 'BNSS' for short) against the judgment and order dated 29.08.2019 passed by the learned 13th Additional Senior Civil Judge & Additional Chief Judicial Magistrate, Surat (hereinafter be referred to as "the Trial Court), whereby the learned trial Court has acquitted the respondent - accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'NI Act' for short).

2. Heard learned counsel appearing for the respective parties.

3. This matter is required to be transferred in view of the recent decision of the Hon'ble Supreme Court in the case of **Celestium Financial Vs. A.Gnanasekaran Etc**. reported in **2025 (3) GLH 747** wherein the Hon'ble Supreme Court has held that the original complainant to be considered as a victim of the offence under Section 138 of the Act and, therefore, the complainant has right to file an appeal under Section 372 of the Code before the lower Appellate Court i.e. immediate Sessions Court before the District and the judgment dated 22.12.2025 rendered in Criminal Misc. Application No.12753 of 2019 with Criminal Misc. Application No. 12908 of 2019.

4. Before entering into the merits of this case, this Court deems it proper to refer to the decision rendered by this Court in the case of Shivsinh Ganpatsinh Solanki Vs. State of Gujarat being Criminal Miscellaneous Application Nos. 12753 of 2019 with 12908 of 2019 and the decision of the Hon'ble Supreme Court in the case of **Celestium Financial Vs. A. Gyanasekaran** (supra) wherein the Hon'ble Supreme Court has observed and held that the complainant, in a complaint under Section 138 of the N.I. Act, considered to be a victim, has a specific right to file an appeal against the order of acquittal under Section 372 of the Code / Section 413 of the BNSS to the Court which is immediately superior in hierarchy i.e. the Sessions Court.

5. Learned Additional Public Prosecutor has pointed out that the matter in the case of **Celestium Financial Vs. A. Gyanasekaran** (supra) is now pending at large before the Hon'ble Supreme Court in case of M/s. Everest Automobiles Vs. M/s. Ranjit Enterprises in Special Leave to Appeal (Crl.) No. 12350/2024 wherein the Hon'ble Supreme Court has observed that it is desirable that a larger Bench gives an authoritative pronouncement on this issue as it has far-reaching

consequences. Therefore, the matter is to be decided subject to the final outcome of the reference.

6. In the case of **Celestium Financial Vs. A. Gyanasekaran** (supra), the Hon'ble Supreme Court has held and observed in paras – 7.8, 7.9 and 7.12 as under:-

> *"7.8 In the case of an offence alleged against an accused under Section 138 of the Act, we are of the view that the complainant is indeed the victim owing to the alleged dishonour of a cheque. In the circumstances, the complainant can proceed as per the proviso to Section 372 of the CrPC and he may exercise such an option and he need not then elect to proceed under Section 378 of the CrPC.*
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> *7.9 In this context, we wish to state that the proviso to Section 372 does not make a distinction between an accused who is charged of an offence under the penal law or a person who is deemed to have committed an offence under Section 138 of the Act. Symmetrical to a victim of an offence, a victim of a deemed offence under Section 138 of the Act also has the right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing an inadequate compensation. When viewed from the perspective of an offence under any penal law or a deemed offence under Section 138 of the Act, the right to file an appeal is not circumscribed by any condition as such, so long as the appeal can be premised in accordance with proviso to Section 372 which is the right to file an appeal by a victim, provided the circumstances which enable such a victim to file an appeal are met. The complainant under Section 138 is the victim who must also have the right to prefer an appeal under the said provision. Merely because the proceeding under Section 138 of the Act commences with the filing of a complaint under Section 200 of the CrPC by a complainant, he does not cease to be a victim inasmuch as it is only a victim of a dishonour of cheque who can file a complaint. Thus, under Section 138 of the Act both the complainant as well as the victim are one and the same person.*
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> *7.12 The reasons for the above distinction are not far to see and can be elaborated as follows:*
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> *Firstly, the victim of a crime must have an absolute right to prefer an appeal which cannot be circumscribed by any condition precedent. In the instant case, a victim under Section 138 of the Act, i.e., a payee or the holder of a cheque is a person*

who has suffered the impact of the offence committed by a person who is charged of the offence, namely, the accused, whose cheque has been dishonoured.

Secondly, the right of a victim of a crime must be placed on par with the right of an accused who has suffered a conviction, who, as a matter of right can prefer an appeal under Section 374 of the CrPC. A person convicted of a crime has the right to prefer an appeal under Section 374 as a matter of right and not being subjected to any conditions. Similarly, a victim of a crime, whatever be the nature of the crime, unconditionally must have a right to prefer an appeal.

Thirdly, it is for this reason that the Parliament thought it fit to insert the proviso to sub-section 372 without mandating any condition precedent to be fulfilled by the victim of an offence, which expression also includes the legal representatives of a deceased victim who can prefer an appeal. On the contrary, as against an order of acquittal, the State, through the Public Prosecutor can prefer an appeal even if the complainant does not prefer such an appeal, though of course such an appeal is with the leave of the court. However, it is not always necessary for the State or a complainant to prefer an appeal. But when it comes to a victim's right to prefer an appeal, the insistence on seeking special leave to appeal from the High Court under Section 378(4) of the CrPC would be contrary to what has been intended by the Parliament by insertion of the proviso to Section 372 of the CrPC.

Fourthly, the Parliament has not amended Section 378 to circumscribe the victim's right to prefer an appeal just as it has with regard to a complainant or the State filing an appeal. On the other hand, the Parliament has inserted the proviso to Section 372 so as to envisage a superior right for the victim of an offence to prefer an appeal on the grounds mentioned therein as compared to a complainant.

Fifthly, the involvement of the State in respect of an offence under Section 138 of the Act is conspicuous by its absence. This is because the complaint filed under that provision is in the nature of a private complaint as per Section 200 of the CrPC and Section 143 of the Act by an express intention incorporates the provisions of the CrPC in the matter of trial of such a deemed offence tried as a criminal offence. Therefore, the complainant, who is the victim of a dishonour of cheque must be construed to be victim in terms of the proviso to Section 372 read with the definition of victim under Section 2(wa) of the CrPC."

7. In view of the said submissions and the decision of the Hon'ble

Supreme Court in the case of **Celestium Financial Vs. A. Gyanasekaran** (supra) and decision of this Court in the case of **Thakar Hariprasad Dalsukhram Vs. State of Gujarat and another** reported in **2026 SCC OnLine Guj 569**, this appeal is disposed of with a direction to the Registry to transfer the appeal to the concerned Sessions Court. After it is transferred to the concerned Sessions Court, it has to be treated as an Appeal under the proviso under Section 372 of the Code / Section 413 of BNSS and numbered accordingly and issue notice to the parties. The Registry is directed to transfer the entire record of the case, including the certified copies of the order impugned and record & proceedings, if lying with this Court, to the concerned lower Appellate Court, forthwith.

8. Considering that the matter has been pending for considerable time, the learned lower Appellate Court is required to make endeavour to dispose of the matter as expeditiously as possible. It is clarified that this Court has not gone into the merits of the matter at this stage.

(HEMANT M. PRACHCHHAK,J)

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Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: DOLLYBEN CHETANBHAI VADUKAR(HC01392), PRIVATE SECRETARY, at High Court of Gujarat on 14/10/2026 13:53:54