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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.L.P. 427/2016

M/S AFRIK FARMS PVT LTD

..... Petitioner

Through: Mr. Ram Kawar, Advocate.

versus

V K AGARWAL & ANR

..... Respondents

Through: Mr. Ashish Dutta, APP for the respondent No.3/ State.

**CORAM:**
**HON'BLE MR. JUSTICE VIPIN SANGHI**

**O R D E R**

% **12.08.2016**

**Crl. M.A. No.12571/2016**

1. Exemption allowed subject to all just exceptions.

2. The application stands disposed of.

**CRL.L.P. 427/2016 and CRL.M.A. 12567-12570/2016**

3. The petitioner has preferred the aforesaid leave petition to assail the judgment dated 19.03.2016 passed by the learned MM, NI Act, West-03 in CC No. 4773/1/15 registered at Police Station – Saraswati Vihar, whereby the petitioner's complaint under Section 138 of the Negotiable Instruments

Act has been dismissed and the respondent accused acquitted.

4. Along with the petition, the petitioner has preferred several applications as noted hereinabove, including the application to seek condonation of delay. However, I am not inclined to issue notice on any of the applications in the present case since I do not find merit in the present petition.

5. The case of the petitioner was that he had advanced a friendly loan of Rs.10 Lakhs to the respondent accused, and in repayment thereof, two cheques of Rs.2 Lakhs and Rs.8 Lakhs were issued. The said cheques were dishonoured upon presentation on account of insufficient funds. Since the said amount was not repaid despite issuance of statutory notice, the complaint was preferred.

6. The respondent was summoned and he denied that there was any legal debt or liability towards the plaintiff. He claimed that the said cheques have been misused by the complainant. It has come in the evidence that the said cheques have been signed by the accused. The statement of the accused was recorded under Section 313 Cr.P.C. and the relevant extract thereof reads as follows:

> "*Q2. It has come in evidence against you that in discharge of your liability qua aforesaid loan, you being the Director of accused no. 2 handed over two cheques bearing nos. 011602 dated 22.02.11 for Rs. 8,00,000/- (Ex. CW-1/2) and cheque bearing no. 011603 dated 22.02.11 for Rs. 2,00,000/- (Ex. CW-1/3), both drawn on HDFC Bank Ltd., Gandhi Nagar Branch in favour of the complainant at his Delhi office. What do you have to say?*

*Ans. It is wrong and denied. I have never given the aforesaid cheques against any liability rather the aforesaid cheques were given in blank to the husband of Smt. Inder Kaur who filed the present case against me as a security to him because he promised me to send a person namely Vishnu Bhai Babu Bhai Patel to America in a total amount of Rs. 20,00,000/-. I got agreed on the said deal and requested the husband of Smt. Inder Kaur to take the aforesaid amount on the arrival of the above named person at USA but the husband of Smt. Inder Kaur namely Sh. Afrik Singh put a condition that 50% amount given to him in advance and the security for the remaining 50% amount is provided to him. I with the consent of Vishnu Bhai Babu Bhai Patel got agreed over the same and had given a sum of Rs. 10,00,000/- in cash to Sh. Afrik Singh (husband of Smt. Inder Kaur) as 50% advance on account of sending the person to USA and had also given the aforesaid cheques in blank to him alongwith a letter head as a security for the same but the person sent by Sh. Afrik Singh to Dubai thereafter to Guatmala, thereafter to Mexico by illegal means by the said person i.e. Vishnu Bhai Babu Bhai Patel was got arrested at Mexico and it all happened due to misguidance of the husband of Smt. Inder Kaur who assured me that he has valid manpower license and can send the person to USA legally when the said person was arrested and I was informed about the same by the said person telephonically, I requested Sh. Afrik Singh, husband of Smt. Inder Kaur to make arrangement for the release of said person and the said Afrik Singh sent a no. of Email to his known to at abroad and also sent me a copy of the said Email but the said Afrik Singh could not make the arrangement for the said person and when I started demanding my money back from his and also demanded my blank signed cheques from him he has misused the said cheques through his wife Smt. Inder Kaur by filing the present complaint and also by filling the contents over the cheques as per his convenience and as per suitable to the case. He has also used false documents in the present case."*

7. The learned Magistrate dismissed the complaint by, firstly, returning the finding that the complainant had not been able to prove demand of loan

by the accused. The Court found that there was contradiction and discrepancy in the evidence of the complainant and even in the testimony of the complainant. The complainant was examined as CW-1 and her husband Mr. Afreek Singh was examined as CW-2. In her evidence, CW-1 stated that accused No.1 had approached her to take the loan, while CW-2 had deposed that accused approached him to take the loan and he had told his wife to advance the loan to the accused. The complainant CW-1 did not state that the accused had approached her husband for advancement of loan and that her husband had asked her to advance the loan to the accused.

8. There was discrepancy in evidence with regard to the place where the loan was advanced. The complainant CW-1 states that accused No.1 had approached the complainant at the office address of the complainant, which is 303, Rani Bagh, Pitampura, Delhi – 34. However, in her cross-examination, she deposed that she had gone to the office of the accused to collect the cheques in question. CW-2 had deposed in his cross-examination that "*I, my wife and my attendant namely Rajbir Singh were present at my house when the accused came to me and demanded a loan of Rs.10 lacs*". Thus, the learned Magistrate found that there were material contradictions in the testimony of CW-1 and CW-2 with regard to the person from whom the loan was demanded and the place where he had demanded the loan. CW-2 deposed that his attendant Rajbir Singh was also present when the loan was demanded from CW-2, but the complainant did not examine Rajbir Singh.

9. With regard to the advancement of the loan to the accused, CW-1 had deposed that she had advanced a friendly loan of Rs.10 Lakhs in cash at her office. She stated that she had not withdrawn the said amount from any

bank to advance the friendly loan to the accused and that she had large cash in hand as per her books of account/ balance sheet. Pertinently, the same were not produced. When she was under cross-examination, she stated that till date she has not shown the loan transaction in her books of account and that the same would be shown in the books of account for the financial year ending on 31.03.2011.

10. Yet another aspect on which the learned Magistrate found that the accused had been able to advance a probable defence was that the complainant's husband was engaged in the business of sending workers abroad and that the said cheques had been issued as security for successful transportation of one Vishnu Bhai Babu Bhai Patel to United States. However, the said gentleman was apprehended enroute to USA at Mexico and was imprisoned. In this regard, CW-1 had admitted during her cross-examination as follows:

> *"It is correct that my husband was dealing with the business of sending people to abroad who are willing to go there. Volt. He is bed ridden for last 5 years and now not in a position to work anymore." She also deposed that "It is correct that my husband faced the criminal trial long back relating to the cases for sending the persons to abroad and the said cases are now completed."*

11. CW-2 in his cross-examination stated as follows:

> *"I have faced about 10 criminal cases regarding manpower. Volt. Now, there is no such case pending. The said cases were relating to send the persons to abroad. Volt. They were false cases. I had a valid license for the same."*

12. Consequently, the Court held that from the testimony of CW-1 and

CW-2, it is clear that the version of the accused that the money was given to send some person abroad, stood corroborated.

13. The accused examined Mr. Bhanu Aggarwal as DW-1, who proved e-mail correspondence as DW-1/1 by producing evidence under Section 65B of the Evidence Act Exhibit DW-1/2. These e-mails showed that the complainant had sent e-mails to different persons with copy to the accused, wherein he had mentioned about certain persons being jailed and he also requested that the said persons be bailed out. One of these e-mails also mentions the name of Vishnu Bhai Babu Bhai Chaudhary, who was in jail in Mexico. It was pointed out on behalf of the accused that the said Vishnu Bhai Babu Bhai Chaudhary is the same person as Vishnu Bhai Babu Bhai Patel and his name has wrongly been mentioned in the evidence. Pertinently, the husband of the complainant CW-2 disowned the said e-mail communications. He stated that he never sent any e-mail to Vishal Marva from his e-mail ID afriksinghlubhana@yahoo.com at any point of time till date. He also denied sending e-mails to Mr. Rudy Canales and Mr. Swanter. His denial is contrary to the documentary evidence adduced on record. The learned Magistrate held that from the e-mails it was clear that CW-2 had dealt with Mr. Vishal Marva and Mr. Swanter, and that it was proved that there are material contradictions in his testimony. The same was, therefore, held to be not reliable. The learned Magistrate has held that the aforesaid evidence probablised the defence of the accused, that the cheques were not advanced in consideration of any loan. The same may have been given as security for successful transportation of Vishnu Bhai Babu Bhai Patel to USA. The advancement of loan itself had not been established by the

complainant.

14. Learned counsel for the petitioner has submitted that it was not necessary for the complainant to reflect the advancement of the friendly loan of a short period in his account. He further submits that the accused had vide Exhibit CW-2/A acknowledged that he had issued the cheque in favour of the complainant M/s Afrik Farms Pvt. Ltd.

15. Having heard learned counsel for the petitioner and considered the submissions as also perused the impugned judgment and the documents placed on record, I am of the view that there is no merit in this petition.

16. Exhibit CW-2/A merely mentions that the said cheques had been issued by the accused in favour of M/s Afrik Farms Pvt. Ltd. The accused has not, even otherwise, disputed the issuance of the said cheques. The defence of the accused is that the said cheques had not been issued in consideration of any loan received in cash, or otherwise, by the accused. The defence is that the said cheques had been issued as security for successful transportation of Vishnu Bhai Babu Bhai Patel to USA, which failed. Vishnu Bhai Babu Bhai Patel was arrested in Mexico. The defence taken by the accused is probablised in view of evidence brought on record by the accused, namely, the e-mail communications exchanged by the husband of the complainant with Mr. Vishal Marva and Mr. Swanter, copies whereof were also sent to the accused. Apart from merely disowning and denying the sending of the said e-mail communications, CW-2 has not been able to explain as to in what circumstances the said e-mails were sent, and copied to the accused. Neither the complainant nor CW-2 appear to have

denied that the said e-mail account was that of CW-2. No evidence was led in that regard.

17. In these circumstances, I am of the view that the accused was able to rebut the presumption given under Section 118 and 138 of the NI Act. I find no merit in the present petition.

18. Dismissed.

**VIPIN SANGHI, J**

**AUGUST 12, 2016**

***B.S. Rohella***