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

\+ CRL.L.P. 165/2017

DURGA FAB ..... Petitioner

Through: Mr. Dinesh Gaur and Mr. Deva Mani Mishra, Advs.

versus

SHUBHAM CREATIONS ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

<u>O R D E R</u>

% 22.03.2017

<u>Crl. M.A. No. 4849/2017 (Delay)</u>

Delay in filing the petition is condoned.

Application is disposed of.

<u>Crl. M.A. No. 4850/2017 (Delay)</u>

Delay in re-filing is condoned.

Application is disposed of.

<u>Crl. L.P. 167/2017</u>

Petitioner has prayed for grant of leave to appeal against the judgment dated 10th November, 2016 passed by the learned Metropolitan Magistrate, whereby the respondent has been acquitted of the offence under Section 138 of the Negotiable Instruments Act, 1881 (‘the Act’, for short).

Petitioner had alleged in the complaint that Sandeep Jain was the proprietor of M/s Shubham Creations. At the request of respondent, petitioner had supplied fabric to M/s Shubham Creations from time to time in the year 2010. In order to discharge the liability, respondent issued three cheques bearing no. 115914 dated 20th August, 2011, 115915 dated 10th September, 2011 and 115916 dated 30th September, 2011 for ₹20,000/- each, all drawn on Allahabad Bank. On presentation, these cheques returned dishonoured with the remarks 'funds insufficient' vide memo dated 13th December, 2011 and 17th December, 2011. The amount involved in the cheques was not paid despite service of legal notice, hence, the complaint.

During the trial, Sandeep Jain took a defence that he was not the proprietor of M/s Shubham Creations. No fabric was supplied by the petitioner to him. Sandeep Jain has alleged that he was working as a commission agent for the petitioner and used to sell the fabric of the petitioner on commission of 2%.

Petitioner proved bill no. 399 Ex. CW1/1, challan no. 442 Ex. CW1/2, bill no. 341 Ex. CW1/3, challan no. 458 Ex. CW1/4, bill no. 354 Ex. CW1/5, challan no. 436 Ex. CW1/6, bill no. 355 Ex. CW1/7, challan no. 457 Ex. CW1/8, original cheque no. 115914 Ex. CW1/9, original cheque no. 115915

Ex. CW1/10, original cheque no. 115916 Ex. CW1/11, cheque return memo dated 17.12.2011 Ex. CW1/12, cheque return memo dated 13.12.2011 Ex. CW1/13, legal notice Ex. CW1/14, postal receipts Ex. CW1/15 and Ex. CW1/16 and original courier receipts Ex. CW1/17 and Ex. CW1/18.

On appreciation of evidence, trial court has concluded that petitioner had failed to prove its case beyond a shadow of reasonable doubt, inasmuch as, respondent was able to rebut the statutory presumption under Section 118 and 139 of the Act. In criminal law, prosecution has to prove its case beyond shadow of all reasonable doubts; whereas the accused has to a raise suspicion and prove the defence on the scale of preponderance of probabilities. Petitioner had failed to prove that Sandeep Jain was proprietor of M/s Shubham Creations, inasmuch as, has failed to prove that fabric was supplied by him to M/s Shubham Creations. The cheques were issued by Sandeep Jain in his individual capacity and not as a proprietor of M/s Shubham Creations. There was no stamp of the proprietorship firm on the cheques. Burden of proof was on the petitioner to prove its case after Sandeep Jain had denied the transactions of the sale and purchase. The bills/challans produced and proved by the petitioner did not contain the signatures of Sandeep Jain.

I have heard the learned counsel for petitioner and perused the material placed on record. I find the view taken by the trial court to be a possible view, inasmuch as, it does not suffer from any infirmity in view of the statement of CW1 Rajender Chaudhary, Authorised Representative of petitioner which clearly shows that petitioner has failed to prove that fabric was supplied to respondent. Interestingly, original bills regarding supply of material were placed on record and proved by the petitioner. How a seller can have the original bills is not understandable? Original bill is always with the purchaser and not the seller. Petitioner was the seller. Despite this, he has placed on record the original bills which do not even contain the signatures of Sandeep Jain. This makes the plea of petitioner, that he supplied fabric to the respondent, highly improbable. CW1 has admitted, in his cross-examination, that only the original bill is given to the purchaser and rest of the copies/documents are retained by the seller. However, clarified that original bills are given only after the receipt of payment. This explanation is not a plausible explanation.

CW1 further admitted that statement of account of accused's firm was maintained by his firm, however, no such statement was ever produced or proved by him before the trial court. CW1 produced original income tax returns, however, he did not produce profit and loss account. He stated that he has no idea whether he had filed the balance sheet and profit and loss account with the income tax department. He further stated that he did not submit the list of sundry creditors and debtors. In his cross examination, CW1 further feigned his ignorance as to how many cheques were taken by him from the accused. He also failed to answer as to whether any transaction took place between the petitioner and the accused before 11th June, 2010 and after 9th August, 2010. It is noted that ITR did not reflect the transaction between the petitioner and respondent regarding supply of fabric.

For the foregoing reasons, I do not find this to be a fit case for grant of leave to appeal to the petitioner. Petition is dismissed.

A.K. PATHAK, J.

MARCH 22, 2017
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