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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

APPLICATION FOR LEAVE TO APPEAL (PVT) NO.189 OF 2022

Mittal Narottamdas Shah

...Applicant

vs.

M/s. Shri Ganesh Metal
Industries and Ors.

...Respondents

Mr. Chaitanya A. Malgaonkar i/b Shreyans R. Mamanian for the
Applicant.

Mr. Shailesh Kantharia for Respondent No.1.

Mr. H. J. Dedhia APP for Respondent No.4-State.

CORAM : S. M. MODAK, J.

DATED : 4TH JULY 2023

P. C. :

1. Heard learned Advocate for the Applicant, learned Advocate for Respondent Nos.1 to 3 and learned APP for Respondent No.4-State.

2. One of the partner of Respondent No.1-firm, Respondent No.3 was neither served before the trial Magistrate, nor in this proceedings. There is police report mentioning that he is missing since 10th January 2013, whereas Respondent No.1-partnership firm

is concerned, there is report that the firm could not be found at the given address.

3. There is submission on behalf of Respondent No.2 that let the Applicant to issue notice, instead of that the Applicant chose to drop them. In view of that, Respondent No.1-firm and Respondent No.3 are dropped from the array of Respondents.

Application for Leave to Appeal No.189 of 2022:

4. Heard learned Advocate for the Appellant-complainant and learned Advocate for Respondent No.2.

5. With the assistance of learned Advocates, I have read the evidence of the complainant and various judgments. Learned Magistrate acquitted the Respondent-accused, mainly on two grounds :

- (a) No documents are produced to show delivery of goods, and
- (b) No documents are produced to show how the complainant received the cheque, through courier.

6. Respondent No.2 tried to put the suggestion, during cross

examination to the complainant, in fact, he has handed over the cheque to his partner, who is absconding since 2013 and probably he might have handed over the cheque to the complainant, however, these suggestions were denied by the complainant. This contention is also taken by Respondent No.2, when there is reply to the statutory notice.

7. Ultimately, the burden lies on the Respondents to prove the facts pleaded by them, except giving suggestion, the accused has not adduced any evidence to show that, in fact, the cheque was delivered by Respondent No.3 to the complainant. It is true that the complainant has also not produced any document to show that they were received through courier, however, one fact is clear and that is, issuance of cheque is not disputed. If it is so, presumption under section 139 of the N.I. Act will be applicable and in that case there is also presumption that the cheque is issued towards discharge of debt or liability. So not producing the document of delivery will not make any difference. This could have been considered, after the accused could have established his case about handing over cheque to his partner. It has not happened. Hence, the arguable case is made and the following order is passed :

ORDER

- (a) Admit.
- (b) Call for the Record and Proceedings.
- (c) Learned Advocate for Respondent No.2 waives notice of service of Appeal. Let note of appearance be filed.
- (d) Matter be listed in due course.

[S. M. MODAK, J.]