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

\+ **Date of Decision: 04.02.2015**

% **Crl.L.P. No. 52/2015**

M/S SONI IMPEX ..... Petitioner
Through: Mr. Amarjeet Rai, Advocate

versus

M/S TAURAIN OVERSEAS & ANR ..... Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

CRL MA 1639/2015

1. Exemption allowed subject to all just exceptions. The application stands disposed of.

CRL MA 1640/2015 & CRL.L.P. 52/2015

2. The present leave petition has been preferred with 20 days delay. I have heard learned counsel for the petitioner. Since I am not inclined to issue notice on the leave petition, there would be no purpose served in issuing notice on the application seeking condonation of delay.

3. The petitioner/complainant assails the judgment rendered by Sh. Naresh Kumar Malhotra, ASJ-05, Tis Hazari Courts, Delhi in CA no.28/2014 and Old No.48/2013 titled M/s Taurian Overseass v. M/s Soni

Impex, whereby the said appeal preferred by the respondent/accused has been allowed and, simultaneously, the appeal preferred by Soni Impex being CA No.28/2014 and Old No.52/2013 (against the order on sentence) was dismissed.

4. The complainant had preferred a complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act) against the accused. The case of the complainant was that Sh. Rakesh Arora was its proprietor, who was dealing in sale of general items such as computers, spare parts, mechanical spare parts, handicrafts, home furnishing, etc. and other electronic items. The accused had been purchasing the goods from the complainant on credit basis and the complainant maintained an open and current account in his regular course of business. The books of account showed that an amount of Rs.4,42,238/- was outstanding against the respondent. In respect of the goods received, the respondent-accused had issued a cheque dated 22.10.2004 for Rs.4,42,238/- towards full and final settlement of the outstanding bills. Upon presentation of the said cheque, it was dishonoured on the ground of insufficient funds; the same was re-presented after telephonic talk with the accused on 25.02.2014 but was again dishonoured; the complainant issued a legal notice on 11.03.2005 under Section 138 of the Negotiable Instruments Act, and; since the amount was not paid within the statutory period, the complaint was preferred.

5. The defence set up by the respondent/accused was that no goods had been purchased by him, i.e. through the firm Taurian Overseas from Soni Impex, the proprietary firm of the complainant. A sham firm had been created in the name of Taurian Overseas by the complainant himself,

showing the accused as the proprietor to inflate the price of the goods imported by him from abroad. The accused claimed that imports were made by the complainant of the products at suppressed rates, which were then sold at higher rates to the accused. The sale proceeds collected for the products-when they were ultimately sold to third parties, were channelled back into the account of the complainant. The accused claimed that he was only an employee of Soni Impex receiving salary from the complainant, as salary and commission. The accused claimed that the complainant himself was maintaining the account of Taurian Overseas while the accused was out of India. He further claimed that like Taurian Overseas, another sham firm viz. Xeon Infotech had been created and was being operated by the complainant. That firm was in the name of the complainant's father.

6. Evidence was led on both sides. By the judgment dated 10.05.2013 passed in the said complaint, the accused was convicted of the offence under Section 138 of the Act. By order of sentence dated 15.05.2013, the accused was sentenced to undergo simple imprisonment for a period of two months.

7. Two appeals were preferred before the Sessions Court. The accused challenged his conviction, whereas the complainant was aggrieved by the fact that the accused had been let off simply with two months simple imprisonment, and no fine had been levied. By the impugned judgment, the Sessions Court has allowed the appeal preferred by the accused and simultaneously dismissed the appeal preferred by the petitioner/complainant. The appellate court has discussed the merits as follows:

> "*7. The accused in his evidence has placed on record statement of account of Xeon Infotech and as per statement of*

account on 06.03.2003 a sum of Rs.2 lac was deposited and this amount was withdrawn on next date and credited in the account of the complainant i.e. M/s. Soni Impex. The appellant/accused in his evidence has categorically stated that the product used to be brought under suppressed value and after entry in India, these goods were routed through 3-4 firms, for this purpose another firm under the proprietorship of his father namely Kulbhushan Behl who is retired from private service was opened namely Xeon Infotech at the relevant time. DW-1 has categorically stated in his cross examination that Taurian Overseas was only a dummy firm as the import by Soni Impex being undervalued was billed in his firm's name i.e. M/s. Taurian Overseas thereafter to Xeon Infotech and later to Grafiti Infotech who used to deal directly with end user customer. DW-1 has also stated that payment received from the client Gratifi Infotech having their account No.0922050002490 in HDFC bank was received in the account of M/s Xeon Infotech on 06.03.2003 amounting to Rs.2 lac, same was transferred as it is to the account of M/s Taurian Overseas, HDFC bank account No.129000007182 on 07.03.2003 and on 07.03.2003 the same was transferred in the account of M/s Soni Impex having account no.1292000001283. This witness also stated that there are almost every entry which reflects the amount received from the customer travelled back to the complainant. The document Ex. AW-1/4(i) clearly indicates that amount of Rs.2 lacs transferred to M/s Taurian Overseas and from M/s Taurian Overseas the same was transferred in the account of M/s Soni Impex. Similarly on 17.03.2003, a sum of Rs.5,38,000/- was transferred in the account of M/s Taurian Overseas and on the same day the amount of Rs.5,38,000/- was transferred in the account of M/s Soni Impex. Thus, it suggest that the version of the DW-1 is appears to be provable when the

DW-1 was not cross examined by the complainant on these points.

8. No suggestion was given to the DW-1 that amount was not credited from the account of M/s Taurian Overseas and Xeon Infotech in the account of M/s Soni Impex. The testimony of DW-1 is not shattered in any manner by the complainant. Moreover, DW-1 has placed on record two counter foils which are proved on record as Ex. AW-1/7 and Ex. AW-1/8, which are in the handwriting of the complainant. No suggestion was given by the complainant to DW-1 that these counter foils are not in his handwriting. Moreover, DW-1 has placed on record the photocopy of passport to show that during his visit to abroad the transaction was done by the complainant in respect of the account of M/s Taurian Overseas.

9. The next contention raised by the counsel for appellant/accused is that the DW-1 was merely an employee of M/s Soni Impex and commission and pay slip were issued by M/s Soni Impex. DW-1 has placed on record a certificate Ex. AW-1/1, which shows that a sum of Rs.27,970/- was given as commission to DW-1 for the financial year 1999-2000. DW-1 has also placed on record certificate Ex AW-1/2 dated 30.04.2001 to show that a sum of Rs.60,000/- was paid as salary for the period April, 2000 to March, 2001. DW-1 has also placed on record certificate dated 31.12.2001, which is proved on record as Ex. AW-1/3 which shows that a sum of Rs.1,58,400/- was given to DW-1 as salary for the period 01.04.2001 to 31.12.2001. During cross examination complainant CW-1 has stated that he do not remember whether he had given any pay slip or commission certificate to accused in the year 1999-2000. Thus, the complainant has not denied about issuance of pay slip or commission to the appellant/accused. Thus, it strengthens the version of the DW-1 *that he was an employee of M/s Soni Impex and M/s Taurian Overseas was created as a dummy firm so that suppressed value of goods can be imported from abroad and thereafter, it was routed through firm of DW-1. The complainant has not placed on record any document to show that any goods were supplied to M/s Taurian Overseas. It is hardly believable that without any bill, goods were supplied to M/s Taurian Overseas. No explanation was given that why pay slip and commission certificate was issued to Rajnish Behl, proprietor of M/s Taurian Overseas. The complainant has also not given any explanation why the account of M/s Taurian Overseas was being managed when he was out of Delhi. DW-1 was not cross examined on the documents produced by him. Not a single suggestion was given to DW-1 that these documents are forged and fabricated. No explanation was given by the complainant why amount of Rs.2 lac was transferred from the account of M/s Taurian Overseas in the account of M/s Soni Impex. It is also not denied that M/s Xeon Infotech was also opened in the name of father of proprietor of M/s Taurian Overseas Rajnish Behl and from this account also amount was transferred in the account of M/s Soni Impex. No explanation has been given that why the complainant was having watch over the dealing of the appellant/accused*".

8. Learned counsel for the petitioner/complainant submits that in para 11 of the impugned judgment, the first appellate court has incorrectly observed that the learned Magistrate had reached the conclusion of the guilt of the accused without dealing with the contentions of the accused. He submits that the defence of the accused had been taken note of by the learned Magistrate on internal page 9 of the said judgment. He also referred to the order of sentence where the contentions of the accused on merits have been recorded.

9. A perusal of the judgment of the learned Magistrate shows that apart from recording some of the aspects of the defence set up by the accused, there is no discussion of the same. The accused was convicted without dealing with his defence. Merely because, while dealing with the aspect of sentence, some of the submissions on merits have again been recorded is neither here, nor there. Having convicted the accused, there was no purpose for discussing the merits of the defence of the accused (for the first time) while passing the order of sentence. The same would amount to putting the cart before the horse. Thus, there is no merit in the submission of learned counsel for the petitioner that the remark made by the first appellate court- that the defence of the accused had not been properly considered, is incorrect.

10. The principles applicable to grant of leave against a judgment of acquittal are well settled. The petitioner has to show that the judgment suffers from perversity or that there is clear misappreciation of evidence by the Court below. Merely because the appellate court may prefer a different view would not be a ground to interfere with the judgment of acquittal as the presumption of innocence stands fortified by the judgment under decree. In this regard reference may be made to ***Guru Nanak Tractors vs. Swarn Singh***, 2014 (3) RLR (CRI) 601.

11. In the present case, the accused was clearly able to raise a serious doubt about the claim of the petitioner complainant that no amount was due from the accused to the complainant on account of supply of any equipment. The accused was able to establish instances where products imported by the complainant in the name of the firm M/s Sony Impex were shown as sold to

M/s Taurian Overseas; from M/s Taurian Overseas to M/s Xeon Infotech; from M/s Xeon Infotech to M/s Grafiti Infotech and the entire payment received in respect of such sale was routed back firstly into the account of M/s Xeon Infotech and from there to the account of M/s Taurian Overseas and further into the account of M/s Sony Impex. The complainant also admitted to have been operating the account of the accused in the name of M/s Taurian Overseas in his absence and even making deposits in the said account on his own. The defence of the accused that he was an employee of the complainant – receiving salary, in the form of salary and commission, was also established. As discussed in the impugned judgment, all these banks clearly show that the accused was able to set up a probable defence which certainly cannot be said to be either perverse or as suffering from misappreciation of evidence. In fact, the judgment of the learned Magistrate failed to consider the evidence on record relied upon by the accused.

12. Therefore, I see no merit in this petition and dismiss the petition and the application seeking condonation of delay.

VIPIN SANGHI, J.

FEBRUARY 04, 2015
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