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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.Revision Petition No.512/2016

Date of Decision: October 19, 2016

SURESH THOMAS

..... Petitioner

Through Mr.Jatin Sapra and
Mr.Vineet D'Silva, Advs.

versus

MOD ENTERPRISES

..... Respondent

Through Mr.Prateek Kumar, Advocate.

**CORAM:
HON'BLE MR. JUSTICE P.S.TEJI**

P.S.TEJI, J.

1. The present revision petition has been filed under Section 397/399/401 Cr.P.C. for quashing the order dated 25.07.2016 whereby the Appellate Court has dismissed the appeal and judgment dated 18.11.2015 and order dated 26.11.2015 whereby the petitioner was convicted of the offence under Section 138 Negotiable Instruments Act, 1881 and sentenced to RI for 4 months and to pay fine of Rs.2.70 lakhs in default to undergo SI for a period of one month.

2. The brief facts of the case, leading to the filing of

present petition are that the respondent had filed a complaint u/s 138 of Negotiable Instruments Act against M/s Crescendo Music Co. Pvt. Ltd., revisionist/Sh. Suresh Thomas, who was the Managing Director of this company, Sh. V Krishnan was the General Manager and Sh. Sarabjot Singh was the Regional Manager of the Company.

3. It was alleged that the petitioner had been doing business with the respondent and had placed orders from time to time. An order for manufacturing 26042 CDs (Compact Discs) was placed by the revisionist vide letter dated 15.07.2004. After the delivery of CDs, as per the terms of that letter, three post dated cheques dated 30.08.2004, 20.09.2004 and 30.10.2004 were issued by the revisionist to the respondent. On presentation, the cheque in question, Ex.CW1/2, was dishonoured for insufficiency of funds, vide cheque returning memos Ex.CW1/3 and Ex.CW1/4. Thereafter, legal notice Ex.CW1/5 dated 07.03.2005 was issued to the accused persons but despite the service of legal notice and expiry of statutory period, the accused including the

revisionist failed to make payment of cheque amount. Hence, a complaint u/s 138 of the Negotiable Instruments Act was filed before the trial court. The trial was conducted whereafter the Trial Court vide order 18.11.2015 found that all the ingredients of Section 138 of the Negotiable Instruments Act had been proved by the complainant beyond reasonable doubt and the accused persons had failed to raise a probable defence so as to rebut the presumptions arising in favour of the complainant. The petitioner being the Managing Director and signatory of the cheque was found guilty and convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and was sentenced to RI for 4 months for the offence under Section 138 of the Negotiable Instruments Act and was also directed to pay fine of Rs.2.70 lakhs under Section 357 Cr.P.C. to the complainant and in default to undergo SI for 1 month. This order has been upheld by the Appellate Court vide order dated 25.07.2016. Hence, the present petition.

4. The grounds taken in the petition and the arguments advanced by the learned for the petitioner in support of his case are that the learned Trial Court and Appellate Court have failed to appreciate that the complainant had virtually failed in proving

its own case. The sole testimony of CW-1 is totally unworthy of any credence being full of infirmities and improbabilities since the basis of the case CW-1/A was an inadmissible evidence which has also been admitted by the Trial Court and Appellate Court; that the Trial Court and the Appellate Court failed to appreciate that EXCW1/A which is purchase order dated 15.07.2005 which states that the material will be supplied and the invoices are of 20.04.2004 to 23.04.2004, which is improbable; that the courts below have failed to appreciate the settled provision of section 114(g) of the Indian Evidence Act since ledger accounts and other documents have been withheld by the respondent thus adverse inference should be taken against the respondent/complainant {**reliance placed on Kundan Lal Rallaram v. Custodian Evacuee Property, Bombay; AIR 1961 SC 1316, Pradip Buragohan v. Pranati Phukan; (2010) 11 SCC 108; S.Gopal Reddy v.State of AP; AIR 1996 SC 2184; Baljit Singh v. State of UP; AIR 1976 SC 2273; Gopal Krishanji Ketkar v. Moh Haji Latif and Ors; AIR 1968 SC 1413; Sri Niwas R Das v. Surjanarayan; AIR 1967 SC 256; M.S.Narayan Menon v. State of Kerala; AIR 2006 SC 3366 & Krishna Janardhan Bhat v. Dattatraya G Hegde; AIR 2008**

SC 1325}; that the courts below have failed to appreciate that the complainant failed in establishing its case and the decision is completely based upon invoices which were neither mentioned in the complaint nor supported by any other document proved by the respondent; that the impugned judgments by the courts below are based upon misappreciation of the complainant's evidence as the invoices in question are admissible as the same were without any endorsement or receiving from the petitioner; that the courts below have failed to appreciate that non filing of ledger accounts, receipt book of invoices and records of ROC has been drawn against the petitioner while the petitioner had taken a stand of security cheque and no legally payable debt in notice under Section 251 Cr.P.C. and thus the onus shifted on the respondent; that the invoices in question were brought on record after 10 years of filing of the complaint and there was no mentioning qua the same in the complaint; that the courts below have failed to appreciate that though the presumption under Section 139 of the Negotiable Instruments Act is in favour of the respondent, however, the petitioner had rebutted it and thus the onus of proving the case shifted to the respondent who has miserably failed to prove the same[reliance placed on Kumar

Exports v. Sharma Carpets; (2009) 2 SCC 513, M.S.Narayan Menon v. State of Kerala; AIR 2006 SC 3366 and K.Prakashan v. P.K.Surenderan; (2008) 1 SCC 258]; that the courts below have miserably failed to appreciate that the no notice was served upon the petitioner which was the essential requirement of offence under which the petitioner was convicted; that the courts below have failed to appreciate that the evidence led by the complainant was full of inherent infirmities and discrepancies; that the courts below have failed to appreciate that respondent/complainant has failed to prove that there was no legally payable debt by the petitioner and that the impugned judgment and order has been passed upon incorrect propositions of law insofar as it relates to the appreciation of evidence.

5. Per contra, countering the same, learned counsel for the respondent has contended that the trial court has rightly arrived at the finding of guilt and has rightly relied upon the documents. He has further contended that there is a clear presumption under Section 139 of the Negotiable Instruments Act in favour of the respondent/complainant and it was for the petitioner to rebut that presumption which they have miserably failed to do. It is further

contended that as far as the ledger accounts, delivery receipts are concerned, this issue for the first time, was raised by the petitioner during the cross examination of CW1 and CW1 had offered to produce these documents on record. The petitioner did not ask for them and thus the respondent cannot be faulted with for not producing these documents on record.

6. I have heard the learned counsel for the petitioner and perused the record.

7. As for the contention raised by the learned counsel for the petitioner with respect to the inadmissibility of the invoices in question, I find that vide order dated 01.11.2014, passed by the Trial Court, these documents were allowed to be taken on record and re-examination of CW1 was allowed in order to prove these documents. This order of the Trial Court apparently was never challenged and thus, had attained finality. Once that order had attained finality, the contention of learned counsel for petitioner loses strength as it would not make any difference whether these documents were filed at an earlier stage or not. Moreover, the grounds of inadmissibility of the invoices in question has not been explained by the learned counsel for the petitioner.

8. Also, when these documents were proved in re-examination of

CW1 dated 05.12.2014 and exhibited as Ex.CW1/B to Ex.CW1/F, at that time, the petitioner had not taken any objection to the exhibition of these documents. From a perusal of that examination and cross examination of CW1 it is very much clear, that it was a conscious decision on behalf of the petitioner not to object to these documents because, on the very same day, another document Ex.CW1/A was sought to be proved in the same examination of CW1 and an objection has been taken on behalf of the petitioner regarding the mode of proof and new facts being brought on record. Therefore, once these documents were proved on record without there being any objection on behalf of the appellant/ accused, there was no reason with the Trial Court for not relying upon these documents to arrive at its finding.

9. As for the continuity of the invoices in question, the same cannot be a ground to find fault with the same or being regarded as manipulated. During the cross examination of CW1, this contention was never put forth to the witness and in the absence of same, the petitioner cannot be allowed to draw a presumption that serial numbers of these documents were in continuity because they were forged or manipulated documents. This could be the inference if, despite being asked to explain why serial numbers of these

documents are in continuity, the witness had failed to put forward an explanation which could be believable.

10. As for the contention that the legal notices were not served upon the petitioner and the trial court erred in arriving at a conclusion that legal notices were properly served and respondent despite being aware of the correct addresses of the appellants, the legal notices sent the notice at the wrong address, I have gone through the cross examination of CW1 as conducted before the trial court on 17.05.2014 where apart from a mere bald suggestion that despite being aware of the correct address of the petitioner, the respondent had deliberately sent notices on wrong address, the petitioner had not brought on record anything to prove that the addresses upon which legal notices were served, were incorrect addresses. A mere suggestion that notices were sent at wrong addresses would not be sufficient as merely giving a suggestion will not amount to proving of the suggested fact. The petitioner could have proved on record, either during the cross examination of CW1, or by leading evidence the address which according to the petitioner was correct address and the fact, that this address was known to the respondent, or that the petitioner had never operated from the address upon which notices were served, but nothing of this sort was done by

the petitioner. Therefore, I do not find any illegality or infirmity in the conclusion of the courts below that the legal notices were duly served upon the petitioner.

11. As for the plea raised by the learned counsel for the petitioner, that the cheques in question had been issued as security and not in discharge of any debt, I do not find any force in the same because a mere statement of defence would not amount to rebuttal of the presumption u/s 139 of Negotiable Instruments Act. The defence taken by the petitioner was required to be proved as per evidence either from the cross examination of CW1, or through evidence being led by the petitioner. The petitioner had failed to do so.

12. As for the plea of the learned counsel for the petitioner that the respondent has failed to prove its case as the respondent had failed to bring on record its ledger books, income tax returns, records filed with ROC and the receipts of delivery, I find that in the cross examination of CW1 conducted on behalf of the petitioner, CW1 had deposed that they maintained account books of transactions and filed ITRs (income tax returns) as well as balance sheets which were filed with the ITR. He further deposed that he could produce the said balance sheets in the court, if required. Further, he denied that the invoices exhibited in his evidence were fabricated documents which

were fabricated for the purposes of the present case. He denied that he had no supporting proof with respect to these invoices. He admitted that there was no acknowledgment of receipt of goods appearing on those invoices. He denied that no such acknowledgment was there because the goods were never sent and volunteered that the invoices were raised only after the cheques were received by them. It is also to be noticed that the petitioner had never asked or questioned CW1 regarding the availability of delivery receipts. However, during the cross examination of CW1 conducted on 17.05.2014, he had admitted that they had not placed on record any receipt with respect to delivery of the material and volunteered, that they had the receipt and it could be produced if required. Thus, during the cross examination of CW1, CW1 had clearly stated that the delivery receipts as well as ITRs reflecting the appellants as their debtors were available with them and could be produced. However, the petitioner did not ask for the production of these documents from the respondent. Thus, when the petitioner despite having an opportunity, did not seek to have these documents produced before the court, they cannot, at this stage, draw a sweeping presumption that non production of these documents should raise an adverse presumption against the respondent. On the contrary, the conduct of the petitioner in not having these documents

called in the court despite there being an offer from CW1, leads an adverse inference against the petitioner that they did not ask for these documents because they might have been in favour of respondent. Moreover, it has never been the case of the petitioner that the CDs have not been supplied to them and once they had received the CDs the question of cheques being tendered as a security itself is ruled out.

13. Therefore, the cases which have been cited by the petitioner do not render any assistance to the case of the petitioner.

14. In view of the aforesaid discussion, I do not find any illegality or infirmity with the concurrent finding returned by the courts below.

15. The present petition is accordingly dismissed.

(P.S.TEJI)
JUDGE

OCTOBER 19, 2016
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