

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

% Decided on: 24th May, 2019

+ **CRL.L.P. 344/2019**

SAMSUNG INDIA ELECTRONICS PVT. LTD Petitioner

Represented by: Mr. Ramesh Gupta, Senior
Advocate with Ajay P Tulsi
and Khushboo Nahar,
Advocates.
Praveen Sangwan, AR for
Samsung.

versus

MGR ENTERPRISES & ORS Respondent

Represented by: None.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

Crl. M.A. No. 11285/2019 (Exemption)

Exemption allowed subject to just exceptions.

Crl.M.A. No.11284/2019 (Delay)

For the reasons stated in the application delay of 39 days in filing the
leave to appeal petition is condoned.

Application is disposed of.

CRL.L.P. 344/2019

1. Aggrieved by the judgment dated 11th February 2019, whereby the
learned Metropolitan Magistrate acquitted the respondent for the offence
punishable under Section 138 Negotiable Instruments Act, 1881 the
petitioner/complainant has preferred the present leave petition.

2. Briefly stated, the facts of the present case as per the complaint are

that the complainant/petitioner is a company duly incorporated under the Companies Act and is in the business of manufacture and sale of consumer electronics and home appliances with the brand name of “Samsung” and is represented by its AR/Assistant Manager Manish Aggarwal. Respondent No.1 is a partnership firm and respondent no.2 to 6 are partners in the firm. The petitioner company had appointed respondent firm as its dealer for Samsung products pursuant to which the respondent firm placed orders for supply of various home appliances which were supplied by the petitioner company against which a running account of the respondent firm was maintained by the petitioner company.

3. At the time of appointment of the respondent firm, it had issued a letter enclosing two duly signed cheques bearing no. 569323 and 569324 drawn on Union Bank of India, Somajiguda, Hyderabad to the petitioner with an understanding that in the event of any amount due and payable by the respondent firm to the petitioner company, the petitioner company shall be authorized to fill up the date and such amount on the cheque as remains unpaid by the respondent firm. The cheques were duly signed by respondent no.5 and were issued with the consent of respondent no.2, 3 and 4. It was also agreed between the parties that in case the respondent firm changed the signatory of the cheques or closed the account, the respondent shall replace the aforesaid cheques by providing the petitioner with new cheques either from the same account or from a new account as the case may be.

4. On 14th November 2011 there was an outstanding balance of Rs.35,06,831/- which was due and payable by the respondent firm. Even after reminders, the respondent firm failed to make the payment. Pursuant to the agreement, the petitioner filled up cheque bearing no.569323 with the

outstanding amount of Rs.35,06,831/-. On presentation of the aforesaid cheque, it was dishonoured with remarks “*funds insufficient*” vide bank return memo dated 28th November 2011. Legal demand notice dated 22nd December, 2011 was sent to the respondent firm. Respondent no.2 and 4 sent a reply dated 28th December 2011 and 30th January 2012 respectively denying their liability towards the cheque in question. Despite the service of legal notice, the respondent firm failed to make the payment. Hence the complaint was filed by the petitioner.

5. Notice under Section 251 Cr.P.C. was framed against the respondents to which they pleaded not guilty and claimed trial. In their reply to the notice, respondent no.2 and 3 stated that they had retired from the respondent firm prior to the date of the present offence. Respondent no.4 stated that the disputed cheque did not bear his signature and no legal notice was served upon him. Respondent no.5 stated that the disputed cheque was given at the time of the agreement without filling any amount in it and the petitioner company has not followed due business process before submitting the said cheque to the bank.

6. Petitioner company examined its authorized representative Manish Agrawal as CW-1 who filed his evidence by way of affidavit Ex.CW-1/3. He relied upon the copy of the power of attorney of the petitioner company vide Ex.CW-1/1, letter issued by the respondent firm vide Ex.CW-1/4, statement of account of respondent firm maintained by the petitioner company vide Ex.CW-1/5, Original cheque vide Ex.CW-1/6, cheque return memo vide Ex.CW-1/7, copy of legal notice vide Ex.CW-1/8 and postal receipts and AD cards vide Ex.CW-1/9 to Ex.CW-1/11.

7. In his cross-examination for respondent no.2, 3 and 5, Manish

Agarwal deposed that the distributorship agreement between the petitioner company and respondent no.1 was executed before he joined the petitioner company in the year 2006. He admitted that the photocopy of the agreement brought on record was the original agreement. He further admitted that the ledger does not show the details of the products delivered. He further admitted that for every delivery a separate invoice was sent to the party however he did not have a copy of the said invoice. He further stated that there was no standard policy in consumer electronics and it could not be said that as per business practice there has to be a 3% discount on the total turnover to be issued by way of incentive to all the dealers/distributors besides price, scheme, promotion, discounts and losses in price war. In the ledger account filed in court, there are few entries showing some incentives but the said ledger was not for the entire period. The petitioner company gets the invoice copy after the supply is made as it shows to whom the said delivery was made. The invoices had not been filed on record to show the delivery to the respondent. The entire business took place between one Bhanu Murti and Manager of Samsung at Hyderabad.

8. Respondent no.2 and 3 in their statements recorded under Section 313 Cr.P.C. stated that they were only sleeping partners of the respondent firm and had already resigned from the partnership firm in the year 2009 before the claimed amount became due.

9. Respondent no.4 in his statement recorded under Section 313 Cr.P.C. stated that the disputed cheque bears the stamp of the respondent firm of which he is a partner and the same bears the signature of respondent no.5. He was not aware under what circumstances and on what condition the disputed cheque was given to the petitioner company. He was only the

sleeping partner of the said firm and was not responsible for the day to day affairs of the firm.

10. Respondent no.5 in his statement recorded under Section 313 Cr.P.C. stated that the cheque in question bears his signature being the partner of the respondent firm. However, the contents of the cheque were not filled by him. He came to know about the dishonour of the cheque when he received the legal notice from the petitioner company. He had also given a reply to the said notice and stated that they were the dealers of the petitioner firm in the year 2008 and the disputed cheque was given blank towards security.

11. Respondent firm examined respondent no.2 as DW-1 and respondent no.5 as DW-2.

12. DW-1 deposed that he and his wife had resigned from the firm even prior to the receipt of the legal notice and the firm was being run by respondent no.4 Rajender Reddy and Bhanu Murti. He placed on record a copy of the retirement deed of him and his wife.

13. DW-2 placed on record a copy of a letter bearing acknowledgement of petitioner company and copy of blank cheques bearing similar acknowledgement. There were blank signed letter heads which were kept in his office as he was studying at that time. There were some blank signed cheques that were taken by his brother that is respondent no.4 who was also responsible for all transactions.

14. Syed Sarfaraz Ahmed examined the signatures of Respondent No. 5 on the letter issued by the Respondent firm and the cheque in question. He gave his report vide Ex. CW-2/A and proved the negatives of the 8 photographs of the disputed and admitted signature of Respondent No. 5.

15. The petitioner company through its Authorized Representative

testified that respondent no. 2 to 5 were partners in the respondent firm and were responsible for its affairs at the time of commission of the offence but no evidence has been placed on record to show as to how and in what manner the respondents were responsible for the conduct of the business of the respondent firm. Respondent no.2 and 3 had retired from the respondent firm at the time of the commission of the offence and the same has been proved by the copy of the retirement deed placed on record by them. Respondent no.4 was also a sleeping partner hence no role of the day to day affairs of the respondent can be attributed to him.

16. As regards the liability of respondent No.5, it is his case that the cheque was given blank signed as a security which fact has to a great extent been admitted by the authorized representative of the petitioner.

17. Further, the petitioner company has placed on record the customer/ledger statement of account of the respondent firm maintained by them from 1st January 2011 to 30th November 2011 in order to show the liability. The same has been produced in the form of a computer printout which is a secondary evidence of the electronic record of data purportedly stored in the computer of the petitioner company. The petitioner company has not provided a certificate under Section 65B of the Evidence Act to prove the same and hence the ledger is inadmissible in evidence. Learned counsel for the petitioner contends that since no objection was raised qua the mode of proof at the time of exhibiting the copies of the ledger account and the same are duly exhibited, proved and admissible in evidence. This contention of learned counsel deserves to be rejected as in the absence of a certificate under Section 65B of the Evidence Act a computer generated document is inadmissible in evidence.

18. Section 65B of the Indian Evidence Act came up for consideration before the Supreme Court in the decision Anvar P.V. (supra) wherein it was held that a computer generated document would be admissible only when accompanied by a certificate under Section 65B Indian Evidence Act and in the absence thereof it would be inadmissible. The three Judge Bench of the Supreme Court in Anvar P.V. (supra) over-ruling its earlier decision in (2005) 11 SCC 600 State (NCT of Delhi) Vs. Navjot Sandhu held:

“14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2).

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the

Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

19. Legal position on the point is thus well settled that is if the document is otherwise inadmissible for want of a certificate or any other requirement of law, it being exhibited in the course of trial does not make the document admissible in law and though an objection as to the mode of proof can be waived off and should be taken at the first instance, however the objection as to the admissibility of a document which goes to the root of the matter

can be taken at any stage. Supreme Court in the decision reported as R.V.E. Venkatachala Gounder (supra) held:

“20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and

pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.”

20. Considering the facts noted above particularly because the petitioner has not been able to prove the legal liability findings of the learned Metropolitan Magistrate cannot be said to be perverse warranting interference of this Court.

21. Leave to appeal petition is dismissed.

(MUKTA GUPTA)
JUDGE

MAY 24, 2019

‘vj’