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

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Judgment delivered on: 29.03.2019

+ CRL.REV.P. 811/2015

M/S TAURIAN OVERSEAS

..... Petitioner

versus

M/S SONI IMPEX AND ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Sanjeev Goyal with Mr. Nipun Gupta and Ms. Kriti Gupta, Advocates.

For the Respondents: Mr. Amarjeet Rai, Advocate for respondent No.1.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

Crl.M.A.9198/2017 (for condonation of delay in re-filing)

1. Petitioner seeks condonation of delay in re-filing the Revision Petition. It is contended that initially the petitioner had filed an application seeking leave to lead additional evidence, however, the same was rejected. The Revision Petition was filed within time, however, certain objections were raised by the registry. The application was taken back for re-filing and got misplaced and subsequently, when the file was traced out, the same was re-filed with

delay.

2. Reply to the application has been filed. However, during submission there was no serious opposition to the condonation of delay. Accordingly, the application is allowed and the delay in re-filing is condoned.

CRL.REV.P. 811/2015 & CrI.M.(Bail) 8349/2015 (for grant of bail during pendency of the petition)

1. Petitioner impugns judgment dated 09.12.2015, whereby, the appeal filed by the petitioner, impugning order on conviction dated 06.06.2013 and order on sentence dated 25.06.2013, has been dismissed.

2. Petitioner has been convicted of an offence under Section 138 Negotiable Instrument Act, 1881 and sentenced to undergo imprisonment for one year and to pay compensation of Rs.10 lakhs to the complainant.

3. Subject complaint was filed by the respondent No.1 contending that he was a dealer in general items *inter alia* computers, spare parts, mechanical spare parts, handicrafts, home furnishing, etc. It is alleged that Respondent No. 2 had been purchasing goods from the complainant on credit basis and a current account was being maintained in the regular course of business. It is alleged that the complainant supplied good to the respondent No.2 against two bills

totalling to Rs.8,80,500/-. Petitioner is the son of the respondent No.2. It is alleged that in discharge of liability of respondent No.2 to the respondent No.1, petitioner issued a cheque bearing No.084680 dated 22.10.2004 in the sum of Rs.8,80,500/-. Subject cheque was dishonoured on the ground of insufficiency of funds. On assurance of the petitioner, the cheque was represented and again dishonoured. Thereafter a legal notice was given to the petitioner which was not complied with. Accordingly, subject complaint was filed.

4. The Trial Court, by its judgment dated 06.06.2013, held that the petitioner had given the cheque in discharge of liability of the respondent No.2 and had not disputed his signatures on the cheque and, accordingly, presumption under Section 118(a) and Section 139 Negotiable Instrument Act, 1881 was fulfilled.

5. The Trial Court, accordingly, held that respondent No.1 had proved its case beyond reasonable doubt and petitioner was convicted of the subject offence. Respondent No.2, who was also arrayed as an accused, was acquitted as the cheque had not been issued by him.

6. The Appellate Court, by the impugned judgment dated 09.12.2015, negated the contention of the petitioner that the transaction between the respondent No.1 and petitioner/respondent No.2 was a sham transaction or that nothing had been supplied. The Trial Court further negated the contention of the petitioner that the respondent No.1 had actually set up two companies one in the name

of the petitioner and another in the name of the respondent No.2 and the petitioner was only an employee of respondent No.1 and the transactions were done by the respondent No.1 in the names of the petitioner and the respondent No.2.

7. The Appellate Court further rejected the contentions of the petitioner that the cheque has not been issued against any legal liability.

8. Learned counsel for the petitioner submits that the respondent No.1 had filed two complaints, one only against the petitioner and the other (subject complaint) jointly against the respondent No.2 and the petitioner with regard to two separate cheques. It is contended that the allegations in the two complaints were identical and in both the cases, the two cheques were alleged to have been issued by the petitioner. He submits that both the cases were consolidated and since the complaint and the defence of the petitioner and the respondent No.2 were common, common evidence was led.

9. Learned counsel for the petitioner submits that the Trial Court convicted the petitioner in both the cases, however, in the case which was filed only against the petitioner, the Appellate Court accepted the contentions of the petitioner and found that petitioner had been able to rebut the statutory presumption and respondent No.1 had failed to prove his case beyond reasonable doubt and accordingly, petitioner was acquitted by the Appellate Court. In a leave to appeal to High

Court against order of acquittal, filed by respondent No.1, impugning the order of the Appellate Court.

10. The High Court accepted the findings returned by the Appellate Court and reaffirmed that the petitioner had been able to rebut the statutory presumption and the respondent No.1 had failed to prove the case beyond reasonable doubt.

11. Learned counsel for the petitioner submits that though the judgment of the High Court in the other case was passed on 04.02.2015 in Crl.L.P.52/2015, said judgment was not brought to the notice of the Appellate Court in this case. He submits that since the leave petition, referred to above, was dismissed without notice to the petitioner, the petitioner was not aware of the judgment and the respondent No.1 concealed the same from the Appellate Court thereby misleading the Appellate Court into passing the impugned order.

12. By the impugned judgment dated 09.12.2015, in these proceedings the Appellate Court has dismissed the appeal of the petitioner holding as under:-

“18. After hearing the arguments and going through the record, I found that so far as the contention that appellant was only an employee of the complainant/respondent, there are three documents on record but according to these documents the last salary was paid for the month of December 2001. Thereafter there is no such documents that any salary was paid to the appellant herein. In my opinion, even if there was any

such relation that has come to an end on 31.12.01 and was not subsisting in the year 2004.

19. The other contention of the Ld. Counsel is that these were sham transactions and in fact no goods were ever supplied but no such evidence has been brought on record that these were sham transactions and nothing was supplied. Ld. Counsel has placed some statement of account to show that money coming from the Graffiti to Taurian Overseas then to Xeon Infotech and ultimately it is going to Soni impex but that itself not mean that no goods were ever supplied. In this case the appellant has also alleged that these cheques were pre signed and left with the complainant/respondent. He himself admitted that the dispute started between the two on financial issues. If that is the position then he should have instructed the bank to stop payment or demanded back his cheque from the complainant/respondent but there is no such notice sent to the complainant/respondent demanding back his cheques or any communication sent to the bank to stop the payment of this cheque as this cheque was not issued against any legal liability. The record shows that in fact the cheque in question bounced due to insufficiency of funds and not due to stoppage of payment as deposed by the witness of the defence itself. Admittedly the cheque bears the signature of the appellant/accused. Statement of account maintained by the complainant/respondent clearly shows an outstanding of Rs.8,80,500/- and to that extent the Ex.CW-1/2 was issued. Legal notice was sent which was duly served. Despite service of notice no payment was made.

20. Keeping in view all these facts, in my opinion Ld. Trial Court has rightly held the appellant guilty and convicted him. So far as order of sentence is concerned that is also upheld as I do not find any reason to differ with the same. There is no merit in the appeal. Appeal is

dismissed. Copy of order along with trial court record be sent back. Criminal appeal file be consigned to Record Room.”

13. Clearly, the Appellate Court in the impugned order has proceeded on the statutory presumption and returned a finding on the ground that the cheque is admitted to have been signed by the petitioner. The Appellate Court has held that in case there was a dispute between the parties, the petitioner should have issued instructions to the Bank to stop payment or demanded back his cheque, which was not done in the present case. The Appellate Court has primarily gone on the finding that as the cheque was dishonoured for insufficiency of funds and bears the signatures of the petitioner and further the statement of account maintained by the respondent No.1 showed an outstanding amount equivalent to the cheque amount, the respondent No.1 had been able to establish his case.

14. It is noticed from the impugned order that the attention of the Court was not drawn to the judgment passed in the appeal filed by the petitioner in the other case where he was acquitted and also to the judgment of this Court whereby the order of the Appellate Court, in the other proceedings, was upheld.

15. The judgment passed by the Appellate Court as well as the High Court in the criminal leave petition in the other complaint have a material bearing on the present case. Both the cases filed by the

respondent No.1 were alleging identical facts. Both the proceedings were consolidated and common evidence was recorded. The contention of the petitioner was that the petitioner was an employee of the respondent No.1 and the respondent No.1 had setup two companies, one in the name of the petitioner and the other in the name of the respondent No.2, his father.

16. The common defence of the petitioner further was that the two companies were dummy firms and import was being done by the respondent No.1 by *suppressed value invoicing* in his own firm and then the goods and invoices were routed through various companies including the companies of the petitioner and respondent No.2. There was no physical transfer of goods or products to petitioner or the firm of his father and the products were directly sent to the customers and the billing was routed through various companies as there was under invoicing. Further, the case of the petitioner is that this was done in the name of the petitioner and respondent No.2 as petitioner was an employee.

17. The contention of the petitioner further was that the respondent No.1 used to deposit cheque or cash in the account of the petitioner in his absence. As per the petitioner, respondent No.1 had got 5 blank cheques signed from the petitioner and subject cheque as also the cheque used in the other case were part of the said 5 blank cheques that had been taken from the petitioner and were successive in

number. Both the cheques were presented on the same date and legal notices qua both the cheques was also issued on the same date.

18. In the other proceedings, the Appellate Court, by judgment dated 16.10.2014, held as under:-

“11. Now, coming to the judgment in hand. The Ld. M.M. vide judgment dated 10.05.2013 has held that the accused is not able to rebut the presumption and vide order on sentence dated 15.05.2013 the Ld. M.M. has held that account of the convict was several times operated by the complainant in absence of convict, there was transaction in his bank account, the account of the accused firm was opened at the instance of the complainant and it has been admitted by the complainant in his cross examination, that he used to have watch over the dealings of accused no.1, the document pertaining to salary certificate of the accused is also on the record, therefore, it cannot be negated that a sham firm was created in the name of the accused by the complainant just to inflate the prices of the goods imported by him from abroad. I fail to appreciate the reasoning of the ld. MM, as in the judgment dated 10.05.2013, these facts were not considered. The ld. MM should have considered these facts in the judgment dated 10.05.2013 and not in the order on sentence dated 15.05.2013. I am of the view that Id. MM has not given any reason why she disbelieved the version of DW-1. The ld. MM should have appreciated the documents and evidence of the accused and then came to the conclusion. The conclusion reached by the ld. MM is against the documents and evidence available on the record. The Ld. MM has admitted all the contentions of M/s. Taurian Overseas in her order on sentence. I am of the view that ld. MM should have dealt all these contentions in the judgment dated 10.05.2014.

19. It may be kept in mind that common evidence was led in both cases. The Appellate Court in the other proceedings relied on the admissions made by respondent No.1 in his cross-examination where he admitted that he used to watch over the dealings of the petitioner. Said Appellate Court also affirmed that the defence raised by the petitioner could not be negated that a sham firm was created in the name of the petitioner by the respondent No.1 just to inflate the prices of goods imported by him from abroad. The Appellate Court in the other proceedings also noticed that in the order on sentence, the Metropolitan Magistrate had accepted the contentions of the petitioner however negated them in the order on conviction.

20. As noticed above, when this order was taken up in a leave to appeal by respondent No. 1, by judgment dated 04.02.2015, a Coordinate Bench of this Court rejected the appeal of the respondent No.1 by holding as under:-

“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.”

21. The coordinate Bench of this Court in the connected case has categorically returned a finding that the petitioner has been able to raise a serious doubt about the claim of the respondent No.1 and establish that no amount was due from the petitioner on account of supply of any equipment. The Court was of the view that the petitioner had been able to establish instances where products imported by the respondent No.1 in the name of the firm M/s. Soni Impex and Ors. (firm of respondent No. 1/complainant) were shown as sold to Ms. Taurian Overseas (firm of petitioner), from Taurian Overseas to M/s. Xeon Infotech (firm of respondent No. 2-father of petitioner) and from M/s. Xeon Infotech to Graffitti Infotech Pvt. Ltd. (ultimate buyer) and the entire payment received in respect of such sale was routed back firstly into the account of M/s. Xeon Infotech then to Ms. Taurian Overseas and then to Soni Impex.

22. The coordinate Bench of this Court in the other proceedings on the same evidence and material has held that the defence of the petitioner that he was an employee of the respondent No.1 receiving salary in the form of salary and commission was also established. The Court has returned a finding that all these facts clearly established that the petitioner had been able to set up a probable defence which could not be said to be either perverse or suffering from misappreciation of evidence. Said Court has returned a finding that the learned Magistrate in convicting the petitioner had failed to consider the evidence on record relied upon by him.

23. As noticed above, the complaint of the petitioner in both the cases were identical and so was the defence of the petitioner. Common evidence was led in both the cases. The coordinate Bench of this Court has clearly held by its judgment dated 04.02.2015 that the petitioner has been able to rebut the presumption and the respondent has failed to establish beyond reasonable doubt its case. This judgment of the coordinate Bench of this Court was not brought to the notice of the Appellate Court when it was hearing the arguments in this matter. Accordingly, the impugned judgment was passed.

24. It is an admitted position that the respondent No.1 did not assail the order of the Coordinate Bench of this Court dated 04.02.2015, wherein, the findings, as noticed above, have been recorded. In that

view of the matter, I am of the view that the impugned order cannot be sustained. Accordingly, the impugned order dated 09.12.2015 is quashed. Petitioner is acquitted of the said offence.

25. Consequently, the amount deposited by the petitioner with the Appellate Court as also with this Court shall be returned to the petitioner along with interest, if any accrued thereon.

26. Petition is, accordingly, allowed.

27. Order *Dasti* under signatures of the Court Master.

Crl.M.A.9197/2017 (filed on behalf of petitioner seeking permission to lead additional evidence)

1. In view of the above orders, no further orders are called for in the application.

2. Application is, accordingly, disposed of.

MARCH 29, 2019
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SANJEEV SACHDEVA, J