BAIL SLIP

That the Appellant /Accused namely R.Sivakumar, S/o.C.Ramanathan (in Crl.A.601/08) was directed to be released on bail, as per order of this Court dated 14.08.2008 and made in MP.1/2008 in Crl.A.601/2008 on th file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 03.07.2018   Pronounced on 31.07.2018

Coram:

The Honourable Dr.Justice G.JAYACHANDRAN

Criminal Appeal No.601 of 2008

R.Sivakumar ... Appellant/Accused

/versus/

State represented by its
Inspector of Police,
CBI:ACB:Chennai,
[R.C.No.12/A/96]. ... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code 1973, against the judgment passed by the Learned Principal Sessions Judge, for C.B.I Cases, Chennai in C.C.No.20 of 1999, convicting the appellant/accused herein and by his judgment dated 22.07.2008 for offences under Section 409 I.P.C and sentencing him to undergo 1 year R.I and to pay a fine of Rs.2,000/- in default to undergo 3 months R.I and also convicted him for offences under Section 13(2) r/w 13(1)(e) & (d) of the Prevention of Corruption Act 1988 and sentenced him to undergo 1 year R.I and to pay a fine of Rs.2,000/- each in default to undergo 3 months R.I.

For Appellant : Mr.R.Karthikeyan

For Respondent : Mr.K.Srinivasan
Special Public Prosecutor [C.B.I]

J U D G M E N T

This appeal is directed against the judgment of the trial Court made in C.C.No.20 of 1999, dated 22/07/2008 holding the accused/appellant guilty of offences under Section 409 of Indian

Penal Code and Section 13(1)(c) and (d) punishable under Section 13 (2) of Prevention of Corruption Act, 1988 and sentenced to undergo one year Rigorous Imprisonment and to pay a fine of Rs 2,000/- in default, to undergo 3 months Rigorous Imprisonment for each one of the offences. The period of substantive sentence ordered to run concurrently.

2. The brief facts of the prosecution case:

Thiru.R.Sivakumar (appellant herein) a public servant, while working as Telephone Operative Assistant (TAO) and Cashier in the Accounts Section of Central Zone of Madras Telephones during February 1995 to January 1996 had committed criminal breach of trust by misappropriating a sum of Rs 1,53,000/- entrusted by Mohammed Basha, H.Vasudev, T.Devaki, G.Sridhar, Thangarajan, Attur Rahman, Md.Sajjid, Satyamurthy, Ayub Khan, M/s Satya Air Travels paid in cash for registration of new telephone connections. To cover up the misappropriation, remmitance for 240 lines made by M/s Sky Cell through 5 demand drafts of Rs.7,20,000/- on 16/02/1995 was utilised. On receipt of cash from the above named persons, the appellant had generated RCR's (in short "Registration slip-cum-Receipt") falsely showing the payment mode by Demand Drafts without mentioning Demand Draft numbers. He has tallied the day collection utilising the amount collected through Demand Drafts and misappropriated the cash remittance. He issued only 234 RCRs to M/s Sky Cell. After few months later, 6 RCR's dated 25/07/1995 in the name of M/s Sky Cell was generated showing payment mode by DD No. 030067 without reflecting in the daily summary sheet of that day. With similar mode of operation, out of 32 Demand Drafts dated 18/04/1995 remitted by OTC Exchange of India', only 20 RCR's were issued and shown in the daily summary dated 1/07/1995. Cash remittance made by 12 subscribers were misappropriated by manipulating the receipts of their cash remittance and adjusted their registrations against these 12 Demand Drafts worth Rs.1,80,000/-.

3. When the above matter came to light, Thiru.R.Srinivasan Vigilance Officer of Madras Telephone had lodged complaint with CBI in writting on 4th March 1996. The CBI had taken up the investigation and submitted the final report. To prove the charges, the prosecution has examined 27 witnesses and marked 404 Exhibits. On the side of the defence, no witness no document was marked.

4. The trial Court has held the accused/appellant guilty. Aggrieved by the judgment of conviction and sentence, the present appeal is preferred.

5. The learned counsel appearing for the appellant would submit that the sanction order granted by PW-1

(Mr.M.Parthasarathy) suffers from non-application of mind. While sanction was granted in respect of misappropriation of 7 demand drafts, the case of the prosecution is entirely different and therefore, suffers from grave defect. The monthly summary and diary summary would show that apart from the appellant, there were other Clerks involved in collecting the deposits. Therefore, the allegation of adjustment of cash paid by the private subscriber with demand draft given by the other subscriber who made bulk booking is falsity. It is an admitted fact that tow copies of RCR will be generated. One will be sent to Account Department for verification. If really any fraud had been committed, it would have been deducted on the same day itself. The CRO Section is responsible for verification. Mr.Gopal at CRO Section absconded immediately after the Vigilance Department lodged complaint to CBI. When the cashier cannot generate RCR in the absence of demand note issued by CRO Section, the reason given by PW-3 regarding failure to deduct the cash on the respective day falls down to the floor is un-proved. To attract Section 409 of Indian Penal Code, the prosecution should have first proved entrustment and misappropriation of the entrusted property. Five demand drafts submitted by M/s Sky Cell for 240 new lines were entrusted to the appellant and he had issued 240 RCRs in the name of M/s Sky Cell. Those RCRs are marked by the prosecution as Exs.P41 to P232. The demand draft entrusted to the Cashier had been properly accounted for 240 RCRs and generated. Therefore, the ingredient to attract Section 409 IPC is absent in this case.

6. The learned counsel appearing for the appellant would submit that, for the remittance made through cash, RCR's are duly issued by the appellant and duly accounted. The procedure followed in the Department at the relevant point of time has been spoken by PW-2-defacto complainant and PW-25-Investigating officer. On receipt of an application for new connection, demand note will be prepared by the Office. Based on the demand note, payment will be paid either by cash or demand draft. On such remittance, RCR's will be generated through computer billing in duplicate. The mode of payment whether cash or Demand Draft has to be fed to generate the RCR's. Whenever the payment is by cash, the appellant has mentioned in the RCR as cash. In case of payment through Demand Draft, he has mentioned the Demand Draft number. All remittance are shown in the Daily Statement. Any payment made after 3.00 pm, the data cannot be fed in the computer from the cash counter. Either those payments has to be written by hand or permission to access the system has to be obtained from the Higher Officials. The appellant is only a Clerk at counter along with few others. The daily accounts submitted by him had been accepted and reconciled by his Superiors with the monthly statements. Thiru.Jagan Babu, CAO in-charge of registration and Mr.Gopal CRO in-charge of accounts

were not examined by the prosecution. In fact, the abscondance of Gopal immediately after registration of First Information Report, which is also admitted by the Investigation Officer has relevancy in this case but not probed. To safeguard Gopal, the prosecution has deliberately omitted to examine Gopal or Jagan Babu fearing exposure of lacuna in the prosecution case.

7. Per contra, the learned Special Public Prosecutor(CBI Cases) would submit that this is a clear case of misappropriation by the Clerk in-charge of collecting money towards remittance for new telephone connection. Taking advantage of the new technology introduced, he had substituted cash payment to payment by Demand Draft and had generated the RCR's. To conceal his misconduct he had made use of the payments made by corporates like M/s Sky cell and OTC Exchange of India. For them he had delayed issuance of RCR's. Given to them in piece meal, had rotated the cash collected, adjusted the daily accounts, manipulated the RCR's falsely showing cash payment as draft payment. After generating the RCR's, he had added the word "ASH" after the word "C" so as to make believe the subscribers that the RCR is issued for their cash payment, whereas in the Monthly statement these cash payments are shown as (D) Demand draft payment instead of (C) cash payment. The trial Court has rightly held the appellant guilty and no ground to interfere.

8. Point for consideration:

Whether the prosecution evidence lack proof beyond doubt in order to interfere with the trial Court judgment ?

9. M/s Sky Cell had applied for 240 connections and for the said purpose it has remitted five demand drafts Ex.P4 to P8 each for Rs.7,20,000/- dated 16.02.1995 drawn at Bank of Baroda, Erabalu Chetty Street, Pannys, Chennai. As against this remittance, the accused/appellant who was in-charge of counter C-11 at Central Zone of Madras Telephones at No.147 Greams Road, Thousand Lights had issued RCRs on different dates as below:

Date	No.of RCRs	In favour of	RCR amount	Exs.
20/02/1995	47	M/s Sky Cell	Rs.15,000/- each	P93 to P139
22/02/1995	46	M/s Sky Cell	Rs.15,000/- each	P47 to 92
13/03/1995	48	M/s Sky Cell	Rs.15,000/- each	
20/03/1995	46	M/s Sky Cell	Rs.15,000/- each	P187 to 232
18/04/1995	47	M/s Sky Cell	Rs.15,000/- each	P140 to 186

Date	No.of RCRs	In favour of	RCR amount	Exs.
25/07/1995	6	M/s Sky Cell	Rs.15,000/- each	P41 to 46

10. Even though all the five DDs (Exs.P4 to 8) each for Rs.7,20,000/- amounting to Rs.36 lakhs paid by M/s Sky Cell and presented to the appellant on 20.02.1995, the appellant had brought on record only one DD No.030063 worth Rs.7.20 lakhs on 20.02.1995. Based upon this DD, 48 lines should have been registered, but he had deliberately issued receipts only for 47 lines on 20.02.1995. On the same day, one Shri Mohammed Basha (PW-15), who had registered for one telephone line (OYT) and paid Rs.15,000/- in Cash was given a receipt showing mode of payment 'through DD'. The cash paid by Shri.Mohammed Basha had been adjusted against the one remaining line of M/s Sky Cell and the amount of Rs.15,000/- paid in cash had been misappropriated by the appellant. In the daily summary(Ex.P275) for 20.02.1995, it is very clear that the appellant had registered only 47 telephone lines for M/s Sky Cell, deposit though money for 48 lines received. In the daily summary, the mode of payment by Shri.Mohammed Basha is shown as Demand Draft. In the RCR issued for Shri.Mohammed Basha(Ex.P233), he has fed the computer billing as "DD. No:C". In the RCR copy given to PW-15 Shri.Mohammed Basha, he had struck off "DD" manually to show as if the mode of payment as for the customer is concerned is by Cash. Whereas, by typing the receipt as "DD No:C" for the official records, it will show as if the mode of payment is by "DD".

11. The appellant had brought the second Demand Draft No.030064 presented by M/s Sky Cell on record on 22.02.1995. Though the DD was for registration of 48 telephone lines, only 46 lines were issued to M/s Sky Cell on that day. On the same day, one Shri Vasudev(PW-14), who got registered for a new telephone line (NOYT) paid Rs.3,000/- in cash has been shown by the appellant, as though he paid through DD. The RCR issued in the name Vasudev is Ex.P235. In this, the appellant has typed the receipt against mode of payment as "DD. No:C" and after generating the RCR he had manually struck off "DD" and added "ash" besides "C" to appear as if cash was paid but on daily summary of that day (22.02.1995) the payment made is shown as "DD" for the Demand Note No.00002569 Rs.3,000/-.

12. The third Demand Draft No.030066 dated 16.02.1995 which was presented to the appellant on 20.03.1995 was brought on record by him on 20.03.1995. On 20.03.1995 the appellant had issued 46 receipts instead of 48. On the same day, one Mrs.T.Devaki(PW-20), who paid in Cash Rs.15,000/- for a new telephone connection (OYT) was issued with a receipt Ex.P239 and

P240 showing the mode of payment through "DD". In the copy of the RCR Ex.P240 given to T.Devaki, the appellant had manually corrected by adding "ash" next to "C" and struck of "DD". In the daily summary of 20.03.1995 (Ex.P279), the mode of payment for the remittance of Rs.1500/- under demand note No.00003386 is shown as "D" instead of "C".

13. The fifth Demand Draft No.030067 dated 16.02.1995 presented by M/s Sky Cell to the appellant on 20.02.1995 was brought on record by the appellant on 18.04.1995. He had issued receipts for 47 lines instead of 48. On the same day, one Shri.G.Sridhar (PW-16), who paid Rs.15,000/- in cash for a new telephone connection (OYT) was issued with RCR(Ex.P237) showing the mode of payment as DD. The cash of Rs.15,000/- has been misappropriated. To conceal that in the daily summary of 18.04.1995 (Ex.P278), the mode of payment is shown as "D" instead of "C". RCRs Ex.P41 to Ex.P46 remaining 6 lines for M/s Sky Cell was issued by the appellant on 25.07.1995. It does not figure in the daily summary taken on that day, Hence it was not brought on record of the telecom Department. While the subscriber i.e M/s Sky Cell got all the 240 lines for which he had paid, the department lost the amount for 6 telephone connections i.e 6 x 15,000/- = Rs.90,000/-which was paid in cash by the customers named above.

14. In respect of OTC Exchange India they have presented 32 demand drafts, which are marked as Exs.P9 to P40 dated 01.07.1995 each for Rs.15,000/-. The appellant has brought only 20 demand drafts on record on 01.07.1995. Ex.P401 series reveals that the appellant had generated 20 RCRs on 01.07.1995 and the remaining 12 RCRS on 03.08.1995. The daily summary for 01.07.1995 and 03.08.1995 would indicate that the payment made for 12 demand drafts had not been properly accounted, while in Ex.P273, MR2 register maintained by the Cash Accounts Section for the period from 17.02.1995 to 30.12.1995, the total amount collected towards Demand Draft on 03.08.1995 is mentioned rightly as Rs.1,22,375/-. Whereas, in Ex.P253 the list of demand notes paid at Counter No.C-11 on 03.08.1995, 12 demand drafts of M/s OTC Exchange of India has been mentioned. The 12 excess entries found in the list of demand notes paid at the Counter No.C-11 to which the appellant is in-charge, does not reflect in the MR2 register maintained at Cash Accounts Section. Thus, misconduct of the appellant to manipulate the statement in order to conceal his misappropriation of the cash entrusted to him by the subscribers is established and strengthen through the deposition of PW-3, who had spoken about the discrepancy in the statement furnished by the appellant as Cashier in Counter No.C-11 and Master Register maintained at the Cash Accounts Section.

15. PW-11- Pioneer International Proprietor Mr.Md.Attur

Rahman had spoken about the payment of Rs.15,000/- in cash on 03.07.1995 and the RCR in Ex.P244 issued to him. Similar to the other cases, in this case also the appellant had generated the RCR by feeding the mode of payment as "DD No:C". Thereafter, he has struck of the word "DD" and inserted the word "ash" next to the word "C". The manual correction in the entries are found in Exs.P244 and P259 respectively. The counter wise demand note collection dated 03.07.1995 indicates that for the demand note 0006269, the mode of payment as "D". PW-11 Pioneer International (Prop.) MD.Attur Rehman had categorically deposed that he had paid Rs.15,000/- in cash at cash counter on 03.07.1995 and received the receipt Ex.P244. In the receipt, the mode of payment is typed as "DD No:C". When he questioned about the same to the cashier, the cashier struck of "DD" and wrote "ash" after "C" in Ex.P244. As pointed out earlier, in the counterwise demand notes collection statement Ex.P259, the mode of payment is shown as demand draft "D" and the person, who has received is mentioned as SIVA, which is admittedly Sivakumar who is the appellant herein. Similar correction has been made in RCR Ex.P246 issued in the name of T.J.Satyamurthi. While RCR has been manually corrected to indicate the mode of payment as "cash", the counterwise demand note collection dated 22.07.1995 marked as Ex.P226 shows that this amount was collected by way of Demand Draft.

16. It is contended by the learned counsel appearing for the appellant that these witnesses have not identified the accused as the person, who was in the cash counter and made the corrections in the RCR. Identification of the accused in this case is not so crucial, since it is an admitted fact that he was in-charge of the counter No.C11 and had generated these RCRs which had been discussed above earlier. The witnesses would have met him, once cannot expect to identify him, after few years and even if the witness had identified him, it would have been suspected by the appellant.

17. From the evidence placed by the prosecution, the irresistible conclusion one could arrive at is that the demand drafts given by M/s Sky Cell Communication and OTS Exchange India has not been properly accounted by the appellant on the day of its presentation and he had not generated RCRs corresponding to the payment made through their demand drafts. In order to misappropriate the cash payment, he had prepared lesser number of RCRs for M/s Sky Cell and OTC, made use of the remaining DD amount for the cash payment made by other subscribers. Later, after 3 months, he had generated 6 RCRs in the name of M/s Sky Cell which are marked as Ex.P41 to Ex.P46. All these RCRs are generated showing the DD number as 030067.

18. The criminality of the appellant through these documents is established beyond reasonable doubt and therefore, the points canvassed by this appellant that 240 RCRs for M/s Sky Cell has been issued does not impeach the evidence of the prosecution. Further, Exs.P233 to Ex.P240 which are RCRs generated in the names of Mohammed Basha, H.Vasudev, T.Devaki, G.Sridhar clearly disclose manipulation. Comparing these RCRs with the daily collection summary the mode of crime gets exposed and proved. This appellant had fed wrong information regarding mode of payment to generate the RCRs. After generating RCRs marked as Exs.P233 to 240, he had corrected manually those RCRs in respect of the mode of payment, which he is not supposed to do. Further, in the daily summary he has falsely entered cash payments as demand draft payments. Therefore, this Court finds no reason to interfere with the judgment of the trial Court and hence, the Criminal Appeal is liable to be dismissed.

19. In the result,
This Criminal Appeal is dismissed and the judgment of conviction passed by the Learned Principal Sessions Judge, for C.B.I Cases, Chennai in C.C.No.20 of 1999, dated 22.07.2008 is hereby confirmed. The trial Court is directed to secure the accused to sever the remaining period of sentence. The period of sentence already undergone by the appellant is ordered to be set off. The substantive sentence is ordered to run concurrently.

Sd/-
Assistant Registrar(CS IX)

//True copy//

Sub Assistant Registrar

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To

1. The Learned Principal Sessions Judge, [C.B.I], Chennai

2. The Special Public Prosecutor [C.B.I]
High Court, Madras.

3. The Inspector of Police,
CBI:ACB:Chennai,

4.The Section Officer,
Criminal Section,
High Court, Madras-104.

5. The DGP Mylapore,
   Chennai-4.

+1cc t Mr.R.Karthikeyan, Advocate SR.No. 51208

Criminal Appeal No.601 of 2008

JP(CO)
GN(10/08/2018)