IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :13.02.2018
PRONOUNCED ON :22.03.2018

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.63 of 2004

1.K.S.Shanmugam
2.P.Subramaniam .. Appellants

/versus/

State by Inspector of Police,
Vigilance and Anti-Corruption,
Erode Wing(Crime No.2/AC/93)
Erode District. .. Respondent

Criminal Appeal is filed under Section 374(2) Cr.P.C., against the conviction and sentence imposed in judgment dated 31.12.2003 made in Special C.C.No.4 of 1999 on the file of the Chief Judicial Magistrate cum Special Judge, Erode.

For Appellants :Mr.N.Manokaran
For Respondent :Mr.P.Govindarajan, APP

J U D G M E N T

Criminal Appeal is filed against the conviction and sentence imposed in judgment dated 31.12.2003 made in Special C.C.No.4 of 1999 on the file of the Chief Judicial Magistrate cum Special Judge, Erode.

2. Background facts leading to this appeal:

Engur Weavers Co-operative Production and Sales Society, Engur, then Periyar (Erode) District registered on 11.02.1981 and commenced functioning from 24.02.1981. Thiru.K.S.Shanmugam was its Manager between 1984 to 1991. Thiru.S.P.Subramaniam was working in that Society as Accountant from 1986 to 29.02.1992.Thiru.C.S.Duraisamy was Dyer from 1988 to August 1991. Thiru.S.Periyasamy was President of that Society from 08/12/1990 to 28/07/1991. Thiru.Ganesan was Special Officer of that Society between 18.12.1989 and 29.02.1992.

3. Based on reliable information, on 27/09/1993 Thiru.M.Subramanaiam, Inspector of Police, V&AC, Periyar Detachment, Erode, registered First Information Report under Sections 120-B r/w 167,477-A, 467,471 r/w 467, 409,420 IPC and Section 13(2) r/w 13(1)(c) and (d) of Prevention of Corruption Act, 1988 against K.S.Shanmugam, Manager Engur Weavers Co-op Production and Sales Society and 7 others who were connected

with the affairs of the said Society and suspected to have involved in the crime, namely conspiracy to falsify the accounts of the Society, as if yarn, dyes, chemicals, firewoods, jacquard cloth kittan blades were purchased and Hand loom Blankets were weaved and printed and as if the Hand loom products of the society were sold in the 37th Handloom Exhibition held at Dindugul between 10/05/1991 and 24/05/1991. Records were created as if in the said exhibition goods worth of Rs.7,13,213/- were sold so as to claim 20% of the sale amount as rebate.

4. Thiru.Gnanavelu, Manager, Periyar District General Central-operative Bank visited the exhibition on 21.05.1991, and found that the stall alloted to Engur Co-operative weavers Society vacant and no trading activity going on. No stock was handed over to the salesman, but bogus bills were prepared as if the goods ranging from Rs.250/- to Rs.450/- sold in the exhibition. In order to claim rebate of 20%, goods sold prior to rebate period were kept in suspense account and shown as if sold during the rebate period.

5. To show fund for purchase of raw materials like yarn, chemicals, firewoods etc, the Trade Deposit Register was manipulated and fabricated as if trade deposits were made by Amuthavalli and Loganathan. Tmt.Amudavalli is none other than the wife of K.S.Shanmugam, who was the Manager of the Society. Loganathan is a fictitious person. To cheat the Society, forged vouchers for payments, fake invoices for purchases and fabricated receipts were produced. Entries in Day books and Trade Deposit Register were falsified to cover up the fraudulent act.

6. On completion of investigation, it was found that 4 distinct offences were committed. So separate charge sheets were filed against the persons involved in the crime. The trial Court has taken cognizance of four distinct offences and had assigned Spl.C.C.Nod.1/1999, 2/1999, 3/1999 and 4/1999.

7. The trial Court, after considering the evidence, had passed separate judgments in each of the cases as below:-

1) Special C.C.No.1/1999: All the accused were acquitted.

2) Special.CC.No.2 of 1999: The Manager K.S.Shanmugam, and Accountant P.Subramaniam were held guilty and convicted. The Special Officer Ganesan (A-2) acquitted.

3) Special C.C.No.3/1999: The Manager K.S.Shanmugam, the Accountant P.Subramaniam and C.S.Duraismy, Dyer were held guilty and convicted. The Special Officer Ganesan (A-2) acquitted.

4) Special C.C.No.4/1999: The Manager K.S.Shanmugam and the Accountant P.Subramaniam were held guilty and convicted. The President of the Society S.Periyasamy acquitted.

8. Criminal Appeal No.63/2004 arising out of Special C.C.No.4/1999 is preferred by the convicted accused K.S.Shanmugam (A-1) and P.Subramaniam (A-2). The 3rd Accused Periyasamy was acquitted. State has not preferred any appeal against his acquittal.

9. Gist of the charges in Spl.C.C.No.4/1999, which is under consideration in the Criminal Appeal 63/2004:

The trial Court, based on the final report filed by the prosecution, after investigation, had framed charges against K.S.Shanmugam, Manager(A1), S.P.Subramaniam, Accountant(A2) and S.Periyasamy, President of Engur Weavers Co-operative Society, Erode, for the offence alleging that they conspired to cheat the Society by forging document such as remittance of Rs.48,000/- by one A.Loganathan towards Trade Deposit and payment of Rs.43,000/- to Madras Textiles towards Printing/dyeing charges and in pursuance to the said conspiracy, stamp receipt for Rs.43,000/- was forged as if the said amount was paid to Madras Textiles for dyeing and painting works, Erode and the Day Book of the Society was falsified by inserting a sum of Rs.48,000/- as cash receipt from A.Loganathan and also made false entry in the day book under the head "Disbursement" of Rs.43,000/- towards printing charge. Later, the loan received from A.Loganathan has been repaid from the account of the Society. The 3rd accused S.Periyasamy being a Public Servant, apart from offence of conspiracy and in furtherance of the conspiracy, falsification of account, forgery for the purpose of cheating the society, a sum of Rs.43,000/- and for breach of trust to misappropriate a sum of Rs.43,000/-charge under Prevention of Corruption Act was also framed.

10. The prosecution to prove the charges have examined PW-1 to PW-6 as prosecution witnesses, marked Exs.P-1 to P-26 as prosecution side exhibits. For the defence, no witness was examined and no document was marked.

11. Finding of the trial Court:

The trial Court found A-1 K.S.Shanmugam (Manager) guilty of offences under Sections 467,471,477-A, 408 r/w 120 B IPC and sentenced him to undergo 3 years RI and to pay a fine of Rs.1,250/- for each offence, in default to undergo 3 months RI each.

A-2 S.P.Subramaniam(Accountant) guilty of offences under Sections 467,471,477-A, 408 r/w 120-B IPC and sentenced him to undergo one year RI and to pay a fine of Rs.250/- for each offence, in default to undergo one month RI each of the offences.

A-3 S.Periyasamy, (President) was acquitted from all charges for want of proof. The period of imprisonment was ordered to run concurrently along with the sentence imposed in Spl.C.C.Nos.2 and 3 of 1999. The period of sentence already undergone ordered to be set off. Aggrieved by the sentence and conviction passed in C.C.No.4 of 99, the first and second accused, who are appellants herein have filed in Crl.A.No.63 of 2004.

12. The contention of the appellants:

The learned counsel appearing for the appellants would contend that the prosecution has not adduced enough evidence to establish the guilty of the accused beyond reasonable doubt. Whereas the trial Court has convicted the appellants based on confabulation and presumption. Without any proof of entrustment or dominion over the property, offence of dishonest misappropriation cannot be made out. In this case, no prosecution witness has spoken about entrustment of property to the accused or dominion over the property by the accused. The alleged falsification of account is not proved by the prosecution by producing the original document. There is no complaint by the Society. The Vigilance and Anti-Corruption Detachment at Erode suo moto has taken up the complaint belatedly and without substantial evidence, had filed the final report.

13. The trial Court, while rightly held that the third accused is not guilty of the charges, ought to have extended the same benefit for these appellants also. The trial Court has failed to consider the fact that the arbitration proceedings initiated by the department under Section 81 of Co-operative Societies act ended in dismissal. There is no evidence to show that money has been misappropriated by the appellants or corresponding loss has been occurred to the Society. Without any documentary evidence, merely based on the oral evidence, the trial Court has accepted the case of the prosecution, without any corroboration. The trial Court ought to have drawn adverse inference against the prosecution for not producing the document sought by the accused. While the investigating officer has categorically admitted in his evidence that during the course of investigation, he inspected the documents and verified the registers, he should have produced the same before the Court. However, the trial Court has wrongly held that the appellants

were in possession of the records and therefore, the investigating officer is not in a position to produce the registers sought by the accused persons. Without producing stock registers and ledgers, falsification of account cannot be alleged. However, on mere oral allegation and evidence, the trial Court has accepted the prosecution case and convicted the appellants. Hence, it is liable to be set aside.

14. Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that the Day Book maintained by the Engur Weavers Co-operative Society is marked as Ex.P1 and the relevant entries marked as Exs.P2 and P3. The appellants herein have written those entries and also signed. Their signatures are identified by the witnesses. In Ex.P2 Register at page No.105 under the receipt column Rs.48,000/- has been shown as receipt from A.Loganathan, Engur east. His name is written after scoring off the name of Amudhavalli. On the disbursement column Rs.43,000/- is shown as payment towards printing charges. This has been written as interpolation with correction and corresponding corrections are made in the other registers.

15. The Madras Textiles dyeing and Printing Works invoice marked as Ex.P7 dated 06.03.1991 is not a genuine invoice. PW-2 K.Jayaprakash who has enquired into the affairs of Engur Society has deposed that invoice of Rs.43,000/- from Madras Textiles Dyeing and Printing Works for printing 4000 bedsheets at the rate of Rs.10/- per piece including transport charges and miscellaneous charges of Rs.43,000/- is a forged document and the corresponding entry made in the day book are false entries. Shanmugam [PW-5], who is the owner of Madras Textiles has identified Ex.P7 is a fake invoice. It does not belong to his company and issued by his company. He has given the reason why he says it is a fake invoice. Similarly, Ex.P8 receipt issued in the name of the Madras Textiles Dyeing and Printing Works for receiving Rs.43,000/- is also a forged receipt. To adjust the payment, the accused have also created fake earnest deposit in the name of A.Loganathan and had issued cash receipt Ex.P10.

16. Therefore, Exs.P1,P2,P3,P7,P8 and P10 and through evidence of PW-2, PW-4 and PW-5, the prosecution have proved forgery, false account, cheating and misappropriation. The entries as found in the Day Book with manipulation and correction and the documents relied on by the defence to support the entries are proved to be fake and fabricated. In Exs.P7,P8 and P10, the accused/appellants as Manager and Accountant had prepared and signed the documents. The corrections in the receipt Ex.P10 and stamp receipt Ex.P8 clearly proves the fabrication of document. Hence, there is no reason to interfere with the finding of the trial Court.

17. Point for consideration:

Whether the trial court judgment is sustainable in view of the grounds raised in the appeal?

18. As per the prosecution, the appellants herein being the Manager and the Accountant had created documents as if Handloom products were printed at the Madras Textiles at the cost of Rs.43,000/- and the said money was paid to the Madras Textiles on 06.03.1991. The said receipt is marked as Ex.P8. A sum of Rs.48,000/- from one Loganathan has been shown as Trade Deposit. For the receipt of the said amount, the appellants herein had given a receipt in favour of Loganathan for a sum of Rs.48,000/-. This receipt is marked as Ex.P10. In this receipt, both the appellants have affixed their signatures as Manager and Accountant respectively. The prosecution in spite of due diligent and enquiry, were not able to identify who is this Loganathan. The appellants have not identified Loganathan to disprove the case of the prosecution that Loganathan is a fictitious person while the prosecution has positively asserted a fact that Loganathan is a non existing person. The appellants who have created record as if they received deposit of Rs.48,000/- from Loganathan, the burden to establish the transaction is a genuine transaction falls on the appellant since they alone have the exclusive knowledge about the Loganathan.

19. It is an admitted fact that the Society is entitled to receive deposit from its Members. But, whether A.Loganathan is a Member of the Society or not could not be ascertained by the prosecution. According to the prosecution, this receipt is a fabricated receipt. Originally, it is issued in the name of Smt.Amuthavalli and her name has been scored off and A.Loganathan name has been written. The amount initially was only for Rs.5,000/-, which has been dishonestly corrected as Rs.48,000/-. This contention of the prosecution is well proved through Ex.P10 wherein Smt.Amuthavalli name is scored off and A.Loganathan name is written as the person, who has remitted. Further Rs.5,000/- is overwritten as Rs.48,000/- in number.

20. Similarly, Rs.5,000/- in words originally written in the receipt has been altered as Rs.48,000/- by scoring the word 'five' and written as forty eight in words. The alteration is in different ink and it could be evidently seen. So, these corrections in the receipt is also reflected in the Day Book entries. On receipt column, Smt.Amuthavalli name is scored off beyond identification and below that A.Loganathan name is written. Rs.5,000/- in number is corrected and '5' is altered as '8' and number '4' is prefixed before '8'. The opening balance in the statement is also corrected. In the disbursement column, a sum of Rs.43,000/- is inserted as interpolation and

closing balance is altered accordingly.

21. In all these documents, the signatures of the appellants are found. The appellants, who are the custodian of these records, have to explain why these corrections are taken place and whether really they received any money from A.Loganathan. There is no explanation has been placed by the appellants for the alterations and interpolations. No doubt, the prosecution have not filed documents to show that A.Loganathan has been repaid. In fact, it is the case of the prosecution that there is no such person by name A.Loganathan as Member of the Society and the transaction itself is a fictitious and make belief transaction.

22. In such circumstances, the Day Book entry based on forged receipts to appear as genuine is proved through the above said exhibits. During the internal enquiry, the appellants have admitted their guilt to PW-2. No contrary evidence is let in by the defence to disprove the version of prosecution. The fact that due to misappropriation of Society fund, the Engur Society become defunct soon after this incident, also proves the loss occurred to the Society, due to misappropriation of fund by its Manager and Accountant who are the appellants herein. Therefore, this Court finds no error in the finding of the trial Court. Hence, this appeal is liable to be dismissed.

23. In the result, this Criminal Appeal is dismissed. The judgment of conviction dated 31.12.2003 made in Special C.C.No.4 of 1999 on the file of the Chief Judicial Magistrate cum Special Judge, Erode is hereby confirmed.

24. The learned counsel appearing for the appellants, apart from contesting the appeal on merit, had also pointed out that the trial Court has adopted parity in awarding sentence, while the accused were found guilty of conspiracy, the trial Court has awarded different sentence to each of the accused. The learned Judge has given reasoning why higher punishment was awarded to the first accused and lesser punishment was awarded to the other accused.

25. Taking note of the fact that the offence took place in the year 1990 and quantum of amount cheated and also present age of the accused, this Court is of the opinion that the period of sentence and description of sentence shall be modified as follows:

A-1 K.S.Shanmugam (Manager) guilty of offences under Sections 467,471,477-A, 408 r/w 120 B IPC and sentenced him to undergo 1 years SI for each of the offences. The period of sentence is ordered to run concurrently. Along with sentence imposed in C.C.No.2 of 99 and C.C.No.3 of 99 as modified by this Court in C.A.No.61 of 2004 and C.A.No.65 of 2004.

A-2 S.P.Subramaniam(Accountant) guilty of offences under Sections 467,471,477-A, 408 r/w 120-B IPC and sentence him to undergo one year SI for each of the offences. The period of sentence is ordered to run concurrently along with the sentence imposed in (C.C.No.2 of 1999) and C.C.No.3 of 1999 as modified in C.A.No.61 of 2004 and C.A.No.65 of 2004.

26. No alteration in the fine amount imposed by the trial Court. From the records this Court finds, the appellants had already paid the find amount. Hence, question of default sentence does not arise.

27. The period of sentence already undergone by the appellants is ordered to be set off. The trial Court is directed to secure the accused to undergo for the remaining period of sentence.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The Chief Judicial Magistrate cum Special Judge, Erode.
2. The Inspector of Police, Vigilance and Anti-Corruption, Erode Wing,Erode District.
3.The Public Prosecutor, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate Sr.No.22019

NRL(CO)
sm:6.4.2018