



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT  
RESERVED ON : 10.08.2018  
DELIVERED ON : 13.08.2018

CORAM:

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THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CrI.R.C(MD)No.238 of 2018  
and  
CrI.M.P(MD)No.3093 of 2018

R.Jacob Pon Paulraj : Petitioner/  
Accused  
Vs.

Jose Jelris : Respondent/  
Complainant

PRAYER: Criminal Revision Case is filed under Section 397 read with Section 401 of the Code of Criminal Procedure, against the judgment passed by the learned Sessions Judge, Kanyakumari at Nagercoil, in C.A.No.75 of 2008, dated 17.02.2018, confirming the conviction and sentence passed by the learned Judicial Magistrate No.III, Nagercoil, in S.T.C.No.3289 of 2006, dated 19.05.2008.

For Petitioner : Mr.M.Subash Babu  
For Respondent : No appearance

### ORDER

The revision petitioner herein is the accused in S.T.C.No.3289 of 2006 on the file of the learned Judicial Magistrate No.III, Nagercoil.

2.Brief facts leading to the filing of this revision are that the petitioner herein borrowed a sum of Rs.3,00,000/- from the complainant, Jose Jelris and promised to repay the same within a month. To discharge the debt, on 10.05.2006 he issued a post dated cheque bearing No.144606, dated 12.07.2006. On presentation of the cheque for collection, it was returned for insufficiency of funds and payment stopped. Statutory notice, dated 21.07.2006 issued by the complainant was received by the petitioner/accused on 22.07.2006. He has not sent reply, inspite of receiving the notice. The Trial Court found him guilty, sentenced him to undergo imprisonment for three months and directed to pay a fine of Rs.5,000/-, in default, to undergo one month rigorous imprisonment. Appeal was preferred by him before the learned Sessions Judge, Kanyakumari at Nagercoil in C.A.No.75 of 2008. The same was dismissed on 17.02.2018 confirming the order passed by the learned Judicial Magistrate No.III, Nagercoil, in S.T.C.No.3289 of 2006, dated 19.05.2008.



3. Learned counsel for the revision petitioner contended that the learned appellate Judge disposed the appeal in the absence of counsels representing the appellant and the respondent. Without affording opportunity and without considering the defence exhibits which rebutted the presumption against the accused, the appellate Court has erroneously dismissed the appeal and confirmed the Judgment of conviction and sentence passed by the Trial Court.

4. Learned counsel for the revision petitioner would heavily harp on the point that the appellate Court should not have decided the appeal in the absence of the counsel. In support of the said submission, he would rely upon the Judgment of the Hon'ble Supreme Court in *Ajay v. State of Haryana* reported in 2001(3) Crimes 194 (SC). In the said case, the learned counsel for the appellant was not able to attend the Court on the date of hearing. The High Court in his absence disposed the appeal based on the records. Taking note of the fact that the Advocate has failed to note the date of hearing and he has satisfactorily explained for his non-appearance and why they were not able to appear before the Court, the Hon'ble Supreme Court set aside the impugned Judgment, to offer one more chance to argue the appeal. In this case, on a perusal of the Judgment passed by the appellate Court, this Court finds that the matter had been pending for ten years and the appellate Court after recording that the case is pending from 2008 and there was no progress for the past ten years, following the Judgment of the Hon'ble Supreme Court in *Bani Singh v. State of UP* reported in AIR 1996 SC 2439, wherein the Hon'ble Apex Court has held that if the counsels are absent, the Court is not bound to adjourn the matter and it can dispose of the appeal after perusing the records and Judgment of the Trial Court, decided the case on merit by dismissing the appeal. In Paragraph Nos.15 and 16 of the Judgment in *Bani Singh's* case, the Hon'ble Supreme Court has held as follows:

"15. ...., the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the appellate Court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that S.385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the Pleader was also considered sufficient since he was representing the appellant. So also S.386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and



place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Ss.385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case (AIR 1987 SC 1500) did not apply the provisions of Ss.385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.

16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted".

5. From the reading of the Judgment relied upon by the appellate Court and the Judgment referred to by the learned counsel for the revision petitioner, this Court would find a markable difference in the facts of the case. Though both the cases were decided on perusal of the records in the absence of the counsel, as pointed out by the Hon'ble Supreme Court in Bani Singh's case cited above, the appellate Court cannot adjourn the case, if the counsels failed to appear or refused to appear, when the matter is listed. Law expects that the appellate Court should dispose of the appeal on merits. In the absence of the counsels, it need not dismiss the appeal for non-prosecution or adjourn the case infinitely. The Court can take assistance of amicus curiae, if necessary or appoint a counsel from



Legal Aid or if the matter does not require any external assistance, on a perusal of the record, can pass order on merits. The first appellate Court has chosen the last option and gone through the records and the explanation of the defence and held against the appellant.

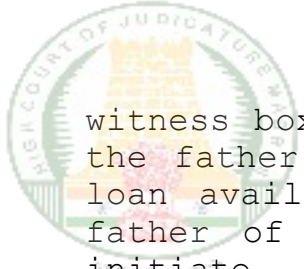
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6.The Ajay case cited supra by the learned counsel for the revision petitioner was passed by the Bench consisting of two Hon'ble Judges, whereas the Judgment relied upon by the first appellate Court passed by the Bench, consisting of three Hon'ble Judges, A.M.Ahmadi, C.J.I., N.P.Singh and Mrs.Sujata V.Manohar, JJ., overruling the earlier Judgment of the Hon'ble Apex Court rendered in Ram Naresh Yadav v. State of Bihar reported in AIR 1987 SC 1500. Though, the learned counsel for the revision petitioner has cited the later Judgment of the Hon'ble Supreme Court, but it was passed by two Judges and had not referred the larger Bench decision [Bani Singh's case] of the Hon'ble Supreme Court passed earlier. Therefore, the submission made by the learned counsel for the revision petitioner carries no merit.

7.The next submission on fact made by the learned counsel is that the explanation offered by the defence regarding the cheque that it was given to one Muthulingam, from whom, the revision petitioner borrowed money. On 06.04.2005, the accused settled the amount with Muthulingam. However, Muthulingam has misplaced the cheque and therefore, executed a deed (marked as Ex.D.1) to the accused, wherein the factum of cheque lost, is reflected. The Trial Court and the appellate Court without considering the defence put forth by the accused, has held that the rebuttal burden of presumption has not been discharged by the accused despite examining the defence witness, Muthulingam and also by marking Ex.D.1 to Ex.D.3.

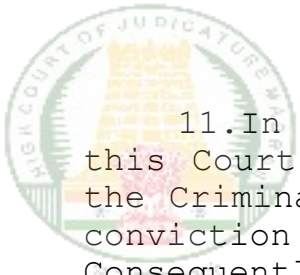
8.The contention of the revision petitioner/accused that the blank signed cheque given to D.W.2, Muthulingam for loan of Rs.10,000/- was stolen by the complainant, filled up and presented for collection, did not find acceptance by both the Courts for the simple reason that if really, the cheque was lost, the accused ought to have lodged a complaint to the police. But, only after the complaint and during the course of the trial, such a defence is projected, which is only an afterthought without any truth.

9.The learned counsel for the revision petitioner would rely upon the recent Judgment of this Court in P.Manivel v. T.Seenivasan reported in 2018(1)MWN (Cr.) DCC 97 (Mad.), wherein the learned Judge relying upon the Judgment rendered by the Hon'ble Supreme Court in Rangappa v. Srimohan reported in 2010(4) CTC 118 (SC), has pointed out that presumption under Section 138 of the Negotiable Instruments Act can be discharged by the accused by preponderance of probability. Like the defence taken in this case, in the case cited above, the accused has waived his right of silence and gone into the



witness box and given evidence that he actually borrowed money from the father of the complainant and later repaid the same. For the loan availed, he gave signed cheque and pronote to Patchaimuthu, father of the complainant. Patchaimuthu has set up his son to initiate the present prosecution. Since the accused has satisfactorily discharged burden of presumption, the Court has dismissed the appeal against the acquittal confirming the order of acquittal by the Courts below, holding that when two views are possible, the view in favour of the accused would merit consideration. Thus, the facts in P.Manivel v. T.Seenivasan reported in 2018(1)MWN (Cr.) DCC 97 (Mad.), cited supra by the learned counsel for the revision petitioner, is that the accused has taken a defence that the money actually was borrowed not from the complainant, but from the father of the complainant. As a security, he gave a cheque, which was misused by the complainant, by filling up his name and lodging a complaint under Section 138 of the Negotiable Instruments Act. The Courts below have accepted his defence and while considering the appeal against acquittal, the High Court has held that by preponderance of probability, the accused has discharged the burden and the Courts below have accepted the defence and acquitted the accused. But the facts of the case in hand, the defence is not that the cheque was issued for debt and the same was misused. Contrarily, the defence is that the cheque was issued to one Muthulingam, that was stolen by the complainant, filled up and a private complaint was lodged under Section 138 of the Negotiable Instruments Act. In the absence of a complaint to the police regarding theft of the cheque and in the absence of any evidence to show how the cheque given to Muthulingam landed in the hands of the complainant, in the absence of any evidence, which would probabilise the subject cheque was not issued to the complainant to discharge an enforceable debt, the Trial Court and the appellate Court have rightly held that Ex.D.1 is a make belief document created in connivance of D.W.2 by the accused. In the said facts and circumstances of the case, though the appellate Court has decided the appeal in the absence of the counsel for the petitioner, the reason for deciding the case on perusal of the records, has been justified in the Judgment of the appellate Court and also had reasoned out why the explanation of the defence does not probablised the reverse presumption.

10.As pointed out earlier, the Full Bench of the Hon'ble Supreme Court has upheld disposal of the appeal on merit after perusal of the records by the Court of appeal in the absence of counsels. Therefore, there is no illegality in disposing the appeal on merit in the absence of the counsel, if they failed to appear, despite the matter listed for final disposal. So far as the explanation adduced by the defence to discharge the burden is concerned, it does not fall within the decree of preponderance of probability, but in the nature of a make belief statement set up by the accused to speak through D.W.2.



11. In the light of the facts and circumstances of the case, this Court finds no merit in the revision petition and accordingly, the Criminal Revision Case is dismissed. The concurrent finding of conviction and sentence passed by the Courts below confirmed. Consequently, connected Miscellaneous Petition is dismissed.

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Sd/-

Assistant Registrar (Cr1.side)

Sub Assistant Registrar (CS-IV)

To

1. The Sessions Judge,  
Kanyakumari at Nagercoil.
2. The Judicial Magistrate No. III,  
Nagercoil.
3. The Section Officer,  
Criminal Section,  
Madurai Bench of Madras High Court,  
Madurai. **(2 copies)**

+1CC to Mr. M. Subash Babu, Advocate, SR.No. 78564

ORDER MADE IN  
Cr1.R.C (MD) No. 238 of 2018  
and  
Cr1.M.P (MD) No. 3093 of 2018  
13.08.2018

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