Bail Slip

The Petitioners/Accused namely 1.Dhanalakshmi Auto Diesel Works Rep by Proprietor I.Mohandoss 2.I.Mohandass S/o Irusappan aged 51 years are directed to be released on bail by this Honorable Court in Crl.M.P.No.1/2012 in Crl.R.C.No.1360 of 2012 dated 09/11/2012.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.12.2019

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.R.C.No.1360 of 2012

1. M/s.Dhanalakshmi Auto
Diesel Works,
Represented by its Proprietor,
I.Mohandoss,
Tindivanam Road,
Mattukaranchavady Post,
Opposite to Ram Complex,
Gorimedu, Puducherry.

2. I.Mohandoss ... Petitioners/Accused

Vs.

1. State represented by
The Public Prosecutor,
Pudhuchery.

2. D.Damodharan ... Respondents/Complainant

Criminal Revision filed under Section 397 r/w 401 Cr.P.C., to set aside the order dated 19.03.2010 passed in C.C.No.242 of 2005 on the file of the Judicial Magistrate Court No.II, Puducherry, confirmed by the judgment and order dated 05.09.2012 passed in C.A.No.10 of 2010 on the file of the III Additional Sessions Court, Puducherry.

For Petitioners: Mr.P.Dinesh Kumar

For R1 : Mr.Bharatha Chakkaravarthy
(Pondy)

For R2 : Mr.R.Thiagarajan

O R D E R

This criminal revision has been filed seeking to set aside the order dated 19.03.2010 passed in C.C.No.242 of 2005 on the file of the Judicial Magistrate Court No.II, Puducherry, confirmed by the judgment and order dated 05.09.2012 passed in C.A.No.10 of 2010 on the file of the III Additional Sessions Court, Puducherry.

2. For the sake of convenience, the petitioners and the second respondent will be referred to as accused and complainant, respectively.

3. It is the case of the complainant that the accused is his family friend; in June 2004, the accused took a hand loan of Rs.3,70,000/- from him, promising to return the said amount within a month; towards the debt, the accused gave a cheque (Ex-P1) dated 05.07.2004 for a sum of Rs.3,70,000/- drawn on Indian Bank, Thiruchitrambalam Branch, on the account, "Dhanalakshmi Auto Diesel Works", Proprietor; when the complainant presented the said cheque (Ex-P1) on 05.07.2004 in South Indian Bank, Puducherry, it was returned unpaid with the endorsement "Funds Insufficient" vide bank's return memo (Ex-P3) dated 08.07.2004; the complainant informed the same to the accused and at the request of the accused, he (complainant) re-presented the cheque (Ex-P1) on 21.09.2004 and again, it was returned unpaid with the endorsement "Funds Insufficient" vide bank's return memo (Ex-P6) dated 24.09.2004; when the complainant contacted the accused, the accused assured him that he will pay the entire amount by 20.10.2004; therefore, the complainant waited till that date; since the accused did not come forward to settle, the complainant presented the cheque (Ex-P1) on 25.10.2004 for the third time and again, it was dishonoured and returned unpaid with the endorsement "Funds Insufficient" vide bank's return memo (Ex-P8) dated 28.10.2004; therefore, the complainant issued a statutory demand notice (Ex-P9) dated 24.11.2004 to Dhanalakshmi Auto Diesel Works (A1) and Mohandoss (A2), Proprietor; the notice sent to Dhanalakshmi Auto Diesel Works (A1) was served on 29.11.2004 vide postal acknowledgement card (Ex-P10), whereas, the notice sent to Mohandoss (A2) was returned as unclaimed; the accused (A1) issued a reply notice (Ex-P12) dated 10.12.2004, repudiating the debt and contending that he used to borrow sums in the range of Rs.5,000/- to Rs.10,000/- from one Dhayanidhi; he had given the impugned cheque (Ex-P1) to Dhayanidhi as security and when difference of opinion arose between him and Dhayanidhi, the latter engineered the present prosecution through the complainant.

4. The complainant initiated a prosecution in C.C.No.242 of 2005 before the Judicial Magistrate No.II, Puducherry, for the

offence under Section 138 of the Negotiable Instruments Act (for brevity “the NI Act”), against the accused.

5. Before the trial Court, the complainant examined himself as PW1 and marked twelve exhibits.

6. When the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. On behalf of the accused, two witnesses viz., Ganesan (DW1), Branch Manager, Indian Bank, Thiruchitrambalam Branch, Puducherry and Mohammed Yousuf (DW2) were examined and four exhibits were marked.

7. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 19.03.2010 in C.C.No.242 of 2005, convicted the accused of the offence under Section 138 of the NI Act and sentenced him to undergo six months rigorous imprisonment and to pay the cheque amount as compensation to the complainant.

8. The appeal in C.A.No.10 of 2010 filed by the accused was dismissed by the III Additional Sessions Court, Puducherry, on 05.09.2012.

9. Aggrieved by the concurrent findings of fact arrived at by the Courts below, the accused have preferred the present revision invoking Section 397 r/w 401 Cr.P.C.

10. Heard Mr.P.Dinesh Kumar, learned counsel for the accused and Mr.R.Thiagarajan, learned counsel for the complainant.

11. Before adverting to the rival submissions, it may be necessary to state here that while exercising revisional jurisdiction in a case involving concurrent findings of fact arrived at by two Courts below, the High Court cannot act as a second appellate Court [See State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand and Others, etc.[1]]. Very recently, in Bir Singh vs. Mukesh Kumar[2], the Supreme Court has held as under:

> “17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [Southern Sales & Services v. Sauermilch Design and Handels GmbH, (2008) 14 SCC 457], it is a well-established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a

1(2004) 7 SCC 659

2(2019) 4 SCC 197

jurisdictional error. .... ” (emphasis supplied)

12. The complainant, who examined himself as PW1, has stated about his relationship with the accused, the loan of Rs.3,70,000/- taken by the accused in June 2004, the issuance of the impugned cheque (Ex-P1), its presentation and dishonour thrice, the issuance of the statutory demand notice (Ex-P9) and the receipt of the reply notice (Ex-P12).

13. The learned counsel for the accused submitted that the presumption under Sections 118 and 139 of the NI Act can be rebutted by preponderance of probabilities, in support of which submission, he placed strong reliance on the recent judgment of the Supreme Court in Basalingappa Vs. Mudibasappa[3], wherein, at paragraph No.23, it has been held as follows:

> “23. We have noticed the ratio laid down by this Court in above cases on Sections 118 (a) and 139, we now summarize the principles enumerated by this Court in following manner:
>
> (i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.
>
> (ii) The presumption Under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.
>
> (iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.
>
> (iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden.
>
> (v) It is not necessary for the accused to come in the witness box to support his defence.”

14. One can have no quarrel with the proposition of law that has been formulated by the Supreme Court in Basalingappa (supra). In Basalingappa (supra), the accused was acquitted by

3 (2019) 5 SCC 418

the trial Court and the acquittal was reversed by the High Court. In the appeal filed by the accused, the Supreme Court observed that the accused had established through Exs-D1 and D2 that the complainant did not have the financial capacity to give a huge loan of Rs.6,00,000/-. Distinguishably, in this case, the complainant, in the cross-examination, has stated that he runs a wine shop in Puducherry and he had given loans not only to the accused herein, but also to one Yuvaraj.

15. The learned counsel for the accused submitted that the accused has examined Ganesan (DW1), Branch Manager, Indian bank, Thiruchitrambalam Branch, Puducherry, through whom, the account statements (Exs-D1 to D3) of the accused have been marked, to show that the accused had not indulged in huge transactions. Based on this, he submitted that the accused has discharged the burden under Section 139 of the NI Act satisfactorily.

16. In the cross-examination of Ganesan (DW1), the complainant has established that the cheque was presented and dishonoured thrice for insufficiency of funds.

17. Now, the question is, can the accused rely upon his own bank account statement and contend that he had not transacted with the complainant at all. The answer to this question can be only in the negative, because, it is not the case of the complainant that he gave the loan of Rs.3,70,000/- by cheque. That apart, the account statement of the accused is an admission, which can be used only against the maker under Section 21 of the Evidence Act and can be used in favour of the maker, only under certain specified circumstances, which are not available in this case.

18. Coming to the evidence of Mohammed Yousuf (DW2), the accused examined him to show that he (accused) had transactions only with Dhayanidhi and not with the complainant. Mohammed Yousuf (DW2) is working in a workshop, which is five doors away from the workshop of the accused.

19. Mohammed Yousuf (DW2), in his evidence, has admitted that the accused would give work to him and that is how he got well acquainted with the accused. It is the not the case of the accused that Mohammed Yousuf (DW2) is his own employee, so that, he (DW2) could have been privy to the financial transactions of his master. Thus, Mohammed Yousuf (DW2), a person working in a workshop, which is five doors away from the workshop of the accused, may not personally know about all the financial dealings of the accused. This is exactly the finding recorded by the trial Court in paragraph No.16 of its judgment to reject the testimony of Mohammed Yousuf (DW2).

20. Though the accused can discharge the burden under Section 139 of the NI Act by preponderance of probability as held by the Supreme Court in Rangappa Vs Sri Mohan[4], even that has not been done in this case.

21. Very recently, in Uttam Ram Vs. Devinder Singh Hudan & Another[5], the Supreme Court has held as follows:

> "20. The trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil Court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that he cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.
>
> 21. There is the mandate of presumption of consideration in terms of the provisions of the Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act."

22. In view of the above discussion, this Court does not find any impropriety or illegality in the judgments and orders passed by the Courts below, warranting interference.

In the result, this criminal revision is dismissed as being devoid of merits. The trial Court is directed to secure Mohandoss (A2) and commit him to prison to serve out the remaining period of sentence. Liberty is given to the parties to approach the trial Court under Section 147, ibid., even after Mohandoss (A2) is taken into custody. In the event of the matter being compounded under Section 147, ibid., the Magistrate shall send a report to the Assistant Registrar (Crl. Section) of this Court, who shall make it form part of the records in Crl.R.C.No.1360 of 2012. If any amount has been deposited by the

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4 (2010) 11 SCC 441

5 Crl.A.No.1545 of 2019 decided on 17.10.2019

accused either in the appellate Court or in the trial Court in connection with this case, the same shall be disbursed with accrued interest to the complainant or to his legal heirs, as the case may be.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Judicial Magistrate No.II,
   Puducherry.

2. The III Additional Sessions Judge,
   Puducherry.

2. The Deputy Registrar,
   (Crl.Side)
   Madras High Court,
   Chennai - 104.

   with a direction to return the original records to the Courts below concerned

+1cc to Mr.P.Dinesh kumar, Advocate Sr.100656
+1cc to the Public Prosecutor Sr.100836
+1cc to Mr.R.Thiagarajan, Advocate Sr.101019

Crl.R.C.No.1360 of 2012

sj[co]
srg 22/01/2020