BAIL SLIP

The Appellant/Accused namely Kaliaperumal was released on bail on 30.06.14 in M.P.No.1/14 in Crl.R.C No.483/14 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.09.2019
DELIVERED ON: 26.09.2019

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.R.C.No.483 of 2014 & M.P. No.1 of 2014

Kaliaperumal ... Petitioner/Appellant/Accused

.Vs.

1)Ramadass
2)R.Karthikeyan

Respondent/Respondent/Complainant

(R2 impleaded as per order in Crl.MP.13616/19 in Crl.RC.483/14 dated 20.09.19)

Criminal Revision preferred under Sections 397 and 401 Cr.P.C. against the judgment and order dated 21.01.2014 passed by the Principal District and Sessions Court, Thiruvarur in Crl.A. No.26 of 2012 confirming the judgment and order dated 06.11.2012 passed in C.C. No.647 of 2005 on the file of the Judicial Magistrate Court, Thiruvarur.

For petitioner Mr. M. Thamizhavel

For respondent Mr. N. Ponraj

ORDER

The instant criminal revision has been preferred calling into question the legality and validity of the judgment and order dated 21.01.2014 passed by the Principal District and Sessions Court, Thiruvarur in Crl.A. No.26 of 2012, confirming the judgment and order dated 06.11.2012 passed in C.C. No.647 of 2005 on the file of the Judicial Magistrate Court, Thiruvarur.

2 For the sake of convenience, the petitioner and the respondent are referred to as accused and complainant respectively.

3 A vignette of the germane facts necessary for the disposal of this criminal revision are as under:

3.1 It is the case of the complainant that the accused borrowed a sum of Rs.2 lakhs from him (complainant) and in discharge of that liability, issued a cheque bearing no. 533958 dated 03.08.2005 (Ex.P.1) drawn on Karur Vysya Bank, Nagapattinam Branch, which, when presented by him (complainant), was returned with the endorsement "funds insufficient" vide bank memo (Ex.P.2); the complainant issued a statutory notice dated 18.08.2005 (Ex.P.3), for which, the accused issued a reply notice dated 17.09.2005 (Ex.P.5) disputing the claim; since the accused did not comply with the demand, the complainant initiated a prosecution in C.C. No.647 of 2005 before the Judicial Magistrate, Thiruvarur, under Section 138 of the Negotiable Instruments Act, 1881 (for short "the NI Act") against the accused.

3.2 To prove his case, the complainant examined three witnesses and marked 8 exhibits.

3.3 When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. He examined himself as D.W.1 and his brother Dakshinamurthy as D.W.2 and marked 14 exhibits. Exs.C.1 to C.3 were marked as Court exhibits.

3.4 After considering the evidence on record and on hearing either side, the Trial Court, by judgment and order dated 06.11.2012 in C.C. No.647 of 2005, convicted the accused of the offence under Section 138 of the NI Act and sentenced him to undergo one year simple imprisonment and pay a fine of Rs.5,000/-, in default to undergo one month simple imprisonment.

3.5 The appeal preferred by the accused thereagainst in Crl.A. No.26 of 2012 before the I Additional District and Sessions Court, Thiruvarur, was dismissed vide judgment and order dated 21.01.2014.

3.6 Assailing the concurrent findings of the two Courts below, the accused has preferred the instant revision under Section 397 and 401 Cr.P.C.

4 Heard Mr.M.Thamizhavel learned counsel for the accused and Mr.Ponraj, learned for the complainant.

5 At the time of hearing this revision, it was brought to the notice of this Court that Ramadass, the complainant, died on 06.07.2016. His son Karthikeyan appeared before this Court and stated that he has no means to engage an advocate and requested

this Court for legal aid. Therefore, this Court appointed Mr. N. Ponraj (Enrolment No.2695/2015) as advocate for the complainant's side. After Mr. Ponraj was engaged, a petition in Crl.M.P.No.13616 of 2019 for substitution of legal heirs of Ramadass was filed by Karthikeyan. Instead of impleading all the legal heirs of the deceased Ramadass, this Court deemed it fit to substitute Karthikeyan alone in place of Ramadass and accordingly, the said petition was allowed on 20.09.2019 ordering impleadment of Karthikeyan alone.

6 Mr. Ponraj, learned counsel for Karthikeyan submitted that while exercising powers under Section 397 read with Section 401 Cr.P.C., this Court should not act as a second appellate Court and in support of the said contention, he placed strong reliance on the judgment of the Supreme Court in Bir Singh vs. Mukesh Kumar[1].

7 It is true that the revisional Court cannot re-appreciate the evidence like a second appellate Court routinely. However, if manifest perversity apparent on the face of the record is noticed by this Court, then, this Court is not denuded of the power to look into the evidence on record in view of Section 386(1) Cr.P.C.

8 In this case, the complainant has not stated anywhere as to when he advanced loan of Rs.2 lakhs to the accused. He has not averred about it in the statutory demand notice (Ex.P.3), in the complaint and in his chief-examination. However, on receipt of the statutory demand notice (Ex.P.3), the accused has sent a reply notice dated 17.09.2005 (Ex.P.5), wherein, the accused has clearly stated that he had not borrowed the sum of Rs.2 lakhs from the complainant; the accused and the complainant's son Karthikeyan are working as Police Constables in the district; the brother of the accused by name Dakshinamoorthy and Karthikeyan were doing business in the name of Sowri Rajan Agency in Keevalur; the (accused) had entrusted some signed cheques with his brother for his business purpose; when Tsunami struck the district in December 2004, the business premises was damaged; Karthikeyan took all the records and changed the premises; disputes arose between Karthikeyan and Dakshinamoorthy in business; therefore, Karthikeyan misused the impugned cheque by giving it to his father Ramadass to initiate a prosecution.

9 Mr. Ponraj, learned counsel for Karthikeyan submitted that the reply notice dated 17.09.2005 (Ex.P.5) was issued after the expiry of 15 day period fixed by Section 138 of the NI Act for payment of the cheque amount after receipt of the statutory

[1] (2019) 4 SCC 197

demand notice (Ex.P.3) by the accused. He further contended that the complaint was filed on 20.09.2005. In other words, Mr.Ponraj submitted that the repudiation of the debt was only after the complaint was filed.

10 Be that as it may, it is essential that the complainant should first aver about the existence of a legally enforceable debt and should further show that the impugned cheque was given in discharge of the said liability. Of course, it is not necessary that the complainant should prove the debt like any other fact in all cases, because, the presumption under Section 139 of the NI Act will take care of the situation.

11 In this case, even in the examination-in-chief, Ramadass (complainant) has not stated as to when the loan was obtained by the accused. Ramadass has been extensively cross-examined by the accused on this aspect, despite which, Ramadass has not stated anywhere as to when he gave the sum of Rs.2 lakhs to the accused. A prosecution under Section 138 of the NI Act can be successfully maintained only in respect of a dishonoured cheque that was given for a legally enforceable debt. A cheque given for a time-barred debt cannot be the foundation for a prosecution under Section 138, ibid. Hence, the complainant should aver as to when the loan was given by him. The accused examined himself as D.W.1 and explained to the Court as to the circumstances under which the impugned cheque came into the hands of Karthikeyan, S/o Ramadass. Mr. Ponraj submitted that the accused, being a Police Constable, had not given any stop payment instruction to his bank when he knew that the cheque has been taken away by Karthikeyan. However, it is the case of the accused that subsequently, he gave a complaint against Karthikeyan to the Superintendent of Police and records have been marked to show that disciplinary action has been taken against both of them for their financial dealings in violation of service rules. Of course, those matters may not be germane to decide the fact in issue.

12 In Rangapppa vs. Sri Mohan[2], the Supreme Court has held that the accused can discharge the burden under Section 139 of the NI Act by preponderance of probability. In this case, when the complainant has not even averred anything about the debt and in the light of the fact that the accused has given a reasonable explanation by adducing evidence as to the circumstances under which the impugned cheque came into the hands of the complainant, this Court is of the view that the accused has discharged the burden under Section 139 of the NI Act. Both the Courts below have failed to note these crucial aspects while convicting the accused.

2 (2010) 11 SCC 441

13 In view of the foregoing discussion, the judgments and orders passed by both the Courts below are set aside and the accused is acquitted of the charge under Section 138 of the NI Act.

14 Ex consequenti, this criminal revision is allowed. Fine amount, if any, paid by the accused, shall be refunded. Bail bond, if any, executed by him shall stand cancelled.

The Tamil Nadu State Legal Services Authority is directed to pay a sum of Rs.10,000/- to Mr. N. Ponraj, as fees.

cad

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1 The Principal District and Sessions Judge
Thiruvarur

2 The Judicial Magistrate
Thiruvarur

3 The Chief Metropolitan Magistrate,
Tiruvarur.

4 The Member Secretary
Tamil Nadu State Legal Services Authority
High Court Buildings
Chennai 600 104

5 The Deputy Registrar
(Crl. Side)
High Court of Madras,
Chennai 600 104

*With a direction to transmit the original records to the Court(s) below

+1cc to Mr.M.Thamizhavel, Advocate, SR.No.82542
+1cc to Mr.N.Ponraj, Advocate, SR.No.83064

Crl.R.C. No.483 of 2014

Kak(31/10/2019)