

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 17.07.2019

DELIVERED ON: 24.07.2019

CORAM:

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

Crl.R.C. Nos.870 to 872 of 2017

and

Crl.M.P Nos.6524, 6525, 6527, 6529, 6530 & 6531 of 2019

Anbarasu Petitioner in Crl.R.C. No.870/2017

The Rajiv Gandhi Memorial
Educational Charitable Trust
represented by Anbarasu
No.36, Anjaneyar Koil Street
Chennai 600 056

Petitioner in Crl.R.C. No.871/2017

P. Mani Petitioner in Crl.R.C. No.872/2017

vs.

1 Mukanchand Bothra (deceased)

2 M.Gagan Bothra Respondents in all Crl.R.Cs.

(R2/legal heir impleaded as per orders dated 17.06.2019 passed by this Court in Crl.M.P. No.7510 of 2019 in Crl.R.C. No.870 of 2017, Crl. M.P. No.7513 of 2019 in Crl.R.C. No.872 of 2017 and Crl.M.P. No.7507 of 2019 in Crl.R.C. No.871 of 2017)

सत्यमेव जयते

Criminal Revisions filed under Section 397 read with Section 401 Cr.P.C. seeking to call for the records in Crl.A. Nos.110 of 2015, 225 of 2016 and 106 of 2015 respectively on the file of the IV Additional Sessions Court, Chennai and to set aside the common judgment and order dated 22.06.2017 passed therein confirming the judgment and order dated 07.05.2015 passed in C.C. No.11127 of 2006 on the file of the IV Metropolitan Magistrate Court (Fast Track Court No.IV), Chennai.

For petitioner in
Crl.R.C.Nos.870 & 871
of 2017

Mr. N.R. Elango, Sr. Counsel
for M/s. Aruna Elango

For petitioner in
Crl.R.C. No.872
of 2017

Mr. B. Kumar. Sr. Counsel
for Mr. S. Ramachandran

R1

Died on 17.04.2019

R2

Gagan Bothra - Party-in-person

COMMON ORDER

These three criminal revisions have been preferred challenging the legality and validity of the common judgment and order dated 22.06.2017 passed in Crl.A. Nos.110 of 2015, 225 of 2016 and 106 of 2015 respectively on the file of the IV Additional Sessions Court, Chennai, confirming the judgment and order dated 07.05.2015 passed in C.C. No.11127 of 2006 on the file of the Fast Track Court No.IV, Chennai.

2 Since the challenge in these criminal revisions is to the common judgment and order as aforesaid, these criminal revisions are considered and decided by this common order.

3 For better appreciation of the facts leading to the institution of the case at hand, it may be necessary to refer to the dramatis personae by their name and also set out the concatenation of events chronologically.

4 Mukanchand Bothra, the first respondent-since deceased (for brevity "Mukanchand") is a financier and R.Anbarasu (A2) is a prominent politician (as per his statement under Section 313 Cr.P.C.) and Founder-Chairman of the Rajiv Gandhi Memorial Educational Charitable Trust (for brevity "the Rajiv Gandhi Trust").

5 The Trust Deed of the Rajiv Gandhi Trust (Ex.P.14) shows that the Trust was founded by Anbarasu (A2) with 7 members, including Kamala A4 - Anbarasu's wife) and P. Mani (A3). Admittedly, the Managing Trustee of the Rajiv Gandhi Trust was Mani (A3).

6 It is the case of Mukanchand that on 03.04.2002, the Rajiv Gandhi Trust borrowed a sum of Rs.20 lakhs from him and a promissory note (Ex.P.11) was executed in his favour; again on 05.07.2002, the Rajiv Gandhi Trust borrowed a sum of Rs.15 lakhs and executed a promissory note (Ex.P.12) in his favour; thus, totally, the Rajiv Gandhi Trust borrowed a sum of Rs.35 lakhs from him.

7 When Mukanchand demanded return of the borrowed amount, the Rajiv Gandhi Trust gave a cheque dated 04.09.2002 bearing no.578204 for a sum of Rs.50,000/- and another cheque dated 09.09.2002 bearing no.578203 for a sum of Rs.6,00,000/-, both drawn on Bank of Baroda, K.K.Nagar Branch, Chennai, in favour of Mukanchand. When Mukanchand presented the said cheques, they were dishonoured. Hence, Mukanchand initiated two prosecutions, viz., C.C. 6787 of 2002 in respect of the cheque for Rs.50,000/- and C.C. No.6788 of 2002 in respect of the cheque for Rs.6,00,000/- under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") before the VIII Metropolitan Magistrate Court, George Town, Chennai against Mani (A3) who was the signatory to the two cheques. It is pertinent to point out that those two cheques were drawn on the account of the Rajiv Gandhi Trust and signed by Mani (A3), in the capacity of Managing Trustee. It is also pertinent to point out that in the said two prosecutions, the Rajiv Gandhi Trust was not shown as accused, because, those were the times when the law relating to vicarious liability under Section 141 of the NI Act was nascent and only after the judgment in Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd.¹, it became essential to include the juristic person also as accused for the purpose of fastening criminal liability vicariously under Section 141 of the NI Act.

8 Not stopping with initiation of criminal proceedings for the dishonour of the two cheques, Mukanchand also filed a money suit in the High Court in C.S. No.652 of 2004 against the Rajiv Gandhi Trust (A1) and its Trustees. From a reading of the plaint in the said suit, it is seen that for each of the two promissory notes, Mukanchand has filed a separate suit and both the suits appear to have been amalgamated in view of commonality of parties to the suits.

9 For maintaining chronology, further narration of the events relating to the two criminal prosecutions and the civil suit is deferred for the present. Suffice it to say that the two criminal prosecutions and the civil suit were moving at a snail's pace without much progress.

1 (2012) 5 SCC 661

10 During the pendency of the civil suit and the two criminal prosecutions, elections to the Tamil Nadu Assembly were notified in April 2006. According to Mukanchand, the Tamil Nadu Congress party nominated Arul Anbarasu (A9), S/o Anbarasu (A2) to contest from Sholingur constituency. On coming to know of that, he addressed representations to the Congress high command stating that nomination should not be given to Arul Anbarasu (A9), because, Anbarasu (A2) has borrowed money from him and has not repaid. After sending such representations, Mukanchand also released them to the Press and gave wide publicity to his objections.

11 At that juncture, a fresh cheque dated 12.04.2006 bearing no.578202 drawn on Bank of Baroda (Ex.P.1) for a sum of Rs.35 lakhs signed by Mani (A3), the Managing Trustee, was given to Mukanchand by the Rajiv Gandhi Trust. When Mukanchand presented the cheque, it was returned unpaid on 13.04.2006 vide cheque return memo (Ex.P.2) with the endorsement "insufficient funds". Mukanchand issued a statutory demand notice dated 15.04.2006 (Ex.P.3) to the Rajiv Gandhi Trust and its 7 Trustees, including Anbarasu (A2), Mani (A3), Kamala (A4), et al. All the covers returned unserved with the postal endorsement "not claimed".

12 Therefore, Mukanchand filed a fresh complaint on 29.05.2006 on the new cause of action in C.C. No.11127 of 2006 before the Metropolitan Magistrate Court, George Town, Chennai, against the Rajiv Gandhi Trust (A1) and its Board of Trustees, viz., Anbarasu (A2), Mani (A3), Kamala (A4), Paramasivam Pillai (A5), T.K.T. Nathan (A6), Shanmuga Selvi (A7) and Paramasivam (A8) and the two sons of Anbarasu (A2), viz., Arul Anbarasu (A9) and Ashok Anbarasu (A10).

13 In the complaint, Mukanchand has stated the aforesaid facts, including the fact that he sent representations to the Congress high command protesting the nomination of Arul Anbarasu (A9) and Ashok Anbarasu (A10) for the Sholingur Assembly constituency and the circumstance in which the accused gave the impugned cheque dated 12.04.2006 for Rs.35 lakhs.

14 In the Assembly elections held in May 2006, the DMK-Congress combine bagged more seats than the AIADMK, resulting in late Mr.M.Karunanidhi forming the Government with Congress support. These are facts of which judicial notice can be taken vide Onkar Nath vs. Delhi Administration².

15 Immediately, Mani (A3) lodged a complaint on behalf of the Rajiv Gandhi Trust (A1) with the police alleging that Mukanchand had cheated them, based on which, a case in C.C.B. Cr. No.548 of 2006 was registered on 07.07.2006 for the offences under Sections 406, 420 and 384 read with Section 511 IPC against Mukanchand and Mukanchand was arrested and remanded to custody and was released on bail after some time. The FIR in Cr. No.548 of 2006 has been marked as Ex.P.13.

16 Thus, from May 2006, three prosecutions viz., C.C. Nos.6787 and 6788 of 2002 and C.C. No.11127 of 2006, all under Section 138 of the NI Act, were going on.

17 The prosecution in C.C. Nos.6787 and 6788 of 2002 ended in the acquittal of the accused on 07.10.2011. Thereagainst, Mukanchand filed two criminal appeals, viz., Crl.A. No.801 of 2011 against the judgment and order passed in C.C. No. 6788 of 2002 and Crl. A. No.802 of 2011 against the judgment and order passed in C.C. No.6787 of 2002 before the High Court.

18 A learned single Judge of this Court allowed both the criminal appeals, viz. Crl.A. Nos.801 and 802 of 2011 on 06.03.2015 and on 19.03.2015, sentenced Mani (A3) as under:

"2.. Considering the representation made by the respondent/accused, instead of imposing sentence to the accused to undergo imprisonment, this Court is inclined to impose a fine of Rs.6,05,000/- in Crl.A. No.801 of 2011 and Rs.55,000/- in Crl.A. No.802 of 2011 and the same has to be paid within a period of two months from today, in default in payment, the respondent/accused shall undergo three months simple imprisonment. Out of the fine amount of Rs.6,05,000/- in Crl.A. No.801 of 2011 and Rs.55,000/- in Crl.A. No.802 of 2011, a sum of Rs.6,00,000/- and Rs.50,000/- respectively are ordered to be paid as compensation to the appellant/complainant."

19 It is reported that the appeal preferred thereagainst by Mani (A3) before the Supreme Court was also dismissed.

20 Challenging the third prosecution in C.C. No.11127 of 2006 relating to Rs.35 lakhs cheque, the Rajiv Gandhi Trust (A2), Anbarasu (A2) and Kamala Anbarasu (A4) preferred Crl.O.P. No.26785 of 2012 under Section 482 Cr.P.C. on various grounds. A learned Single Judge of this Court dismissed Crl.O.P. No.26785 of 2012 on 29.01.2013 and it is stated at the Bar that the appeal filed thereagainst before the Supreme Court in S.L.P.

No.3716 of 2013 was dismissed as withdrawn vide order dated 04.02.2014.

21 Trial commenced in C.C. No.11127 of 2006 in respect of Rs.35 lakhs cheque before the Fast Track Court No. IV, George Town, Chennai. Mukanchand gave power of attorney appointing his son Gagan Bothra as his power agent to prosecute the case on his behalf.

22 Accordingly, Gagan Bothra filed proof affidavit dated 13.05.2014 and marked exhibits P.1 to P.14. The certified copies of the two promissory notes that were filed in C.S. No.652 of 2004 were obtained and they were marked as Exs.P.11 and P.12 for proving the debt and the FIR in Cr. No.548 of 2006 was marked as Ex.P.13.

23 Gagan Bothra was subjected to cross-examination by the accused on 14.08.2014, 20.08.2014, 05.01.2015, 27.01.2015, 29.01.2015, 12.02.2015, 18.02.2015, 04.03.2015, 01.04.2015, 08.04.2015 and 15.04.2015. The accused filed an application under Section 91 Cr.P.C. directing production of the income tax returns of Mukanchand & Sons from the Income Tax Department, pursuant to which, the documents were sent by the Department and the same were marked as exhibits. No defence witness was examined.

24 Gagan Bothra was confronted in the witness box on the income tax returns and the answers given by him will be discussed later. The complaint filed by Mukanchand in C.C. No.6788 of 2002 and the counter affidavit filed by Anbarasu (A2) in C.S. No.652 of 2004 were marked as defence documents (Exs.D.1 and D.2) in the cross-examination of Gagan Bothra.

25 The accused were questioned under Section 313 Cr.P.C. and the answers given by Anbarasu (A2) and Mani (A3) require to be alluded to.

25.1 Anbarasu (A2) has stated that the Rajiv Gandhi Trust was not functional and that the said Trust had not borrowed any money; he does not know the complainant; a false case has been put on him since he is a politician.

25.2 Mani (A3) has stated that the Rajiv Gandhi Trust did not function and the case is a false one.

25.3 Thus, both Anbarasu (A2) and Mani (A3) have not given any plausible explanation as to how the impugned cheque bearing the seal of the Rajiv Gandhi Trust (A1) with the signature of

Mani (A3), the Managing Trustee, has gone into the hands of Mukanchand.

26 After considering the evidence on record and hearing the learned counsel on either side, the Trial Court, vide judgment and order dated 07.05.2015 in C.C. No.11127 of 2006, convicted the Rajiv Gandhi Trust (A1), Anbarasu (A2), Mani (A3) and Kamala Anbarasu (A4) of the offence under Section 138 of the NI Act and sentenced them as under:

Name of accused & their array	Sentence
The Rajiv Gandhi Trust (A1)	To give Rs.35 lakhs as compensation to the complainant as per Section 357 (3) Cr.P.C.
Anbarasu (A2)	2 years simple imprisonment
Mani (A3)	To pay interest of Rs.25,20,000/- to Mukanchand as per Section 357(3) Cr.P.C. @ 9% p.a. for a period of 8 years
Kamala Anbarasu (A4)	

All the others were acquitted.

27 Challenging the aforesaid conviction and sentence, three appeals were filed in the Court of Session, viz., Crl.A. No.225 of 2016 by the Rajiv Gandhi Trust (A1), Crl.A. No.106 of 2015 by Mani (A3) and Crl.A.No.110 of 2015 by Anbarasu (A2) and Kamala Anbarasu (A4). All the three appeals were heard by the IV Additional Sessions Judge, Chennai and a common judgment and order was passed on 22.06.2017, in which, Crl.A.No. 106 of 2015 filed by Mani (A3) and Crl.A. No.110 of 2015 filed by Anbarasu (A2) and Kamala Anbarasu (A4) were dismissed. However, since Kamala (A4) had breathed her last during the pendency of Crl.A. No.110 of 2015, it has been recorded that the appeal abates against her. Coming to Crl.A. No.225 of 2016 filed by the Rajiv Gandhi Trust (A1), the Appellate Court has permitted Mukanchand to withdraw Rs.3 lakhs that was deposited by the accused in the Court at the time of admission of the appeal and after giving credit to that amount, has directed the Rajiv Gandhi Trust (A1) to pay the balance amount of Rs.32 lakhs as compensation to Mukanchand. Challenging the said common judgment and order, the present criminal revisions have been preferred.

28 During the pendency of these criminal revisions, Mukanchand breathed his last on 17.04.2019 and this Court, by orders dated 17.06.2019, as detailed in the cause title to this common order, has permitted his son Gagan Bothra to step into the shoes of his deceased father Mukanchand.

29 Heard Mr. B. Kumar, learned Senior Counsel representing Mr.S.Ramachandran, learned counsel on record for the petitioner Mani (A3) in Crl.R.C. No.872 of 2017, Mr.N.R. Elango, learned Senior Counsel representing M/s. Aruna Elango, learned counsel on record for the petitioners in Crl.R.C. Nos.870 and 871 of 2017, viz., Anbarasu (A2) and the Rajiv Gandhi Trust (A1) respectively and Gagan Bothra, respondent/party-in-person.

30 Before advertng to the rival submissions, it may be necessary to state here that, while exercising revisional powers under Section 397 r/w 401 Cr.P.C., this Court is required to find out, if there is any illegality or impropriety in the findings of the trial Court and the Appellate Court warranting interference and it is not open to this Court to exercise the revisional power as a second appellate forum. In this context, it is profitable to allude to the following paragraphs in State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand and Others, etc.³.

"22.The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,

"for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court".

It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not

indicate that the revisional power of the High Court can be exercised as a second appellate power.
(emphasis supplied)

23. On this aspect, it is sufficient to refer to and rely on the decision of this Court in *Duli Chand v. Delhi Admn.* [(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC p. 651, para 5)

"The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse."

31 The aforesaid legal principle has been reiterated very recently by the Supreme Court in *Bir Singh vs. Mukesh Kumar*⁴, wherein, the Supreme Court formulated the following question of law :

"(i) whether a Revisional Court can, in exercise of its discretionary jurisdiction, interfere with an order of conviction in the absence of any jurisdictional error or error of law"

The Supreme Court answered the above question in paragraph nos.19 and 20 as under:

"19. It is well settled that in exercise of revisional jurisdiction under Section 482 of the Criminal Procedure Code, the High Court does not, in the absence of perversity, upset concurrent factual findings. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record.

20. As held by this Court in *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 jurisdictional error. The answer to the first question is therefore, in the negative."

4 (2019) 4 SCC 197

32 That apart, a 3 Judge Bench of the Supreme Court, in *Girish Kumar Suneja vs. Central Bureau of Investigation*⁵, has held that the revisional jurisdiction of the High Court is only an entitlement and not a right and that such a petition can be rejected even at the threshold.

33 Bearing in mind the aforesaid principles, this Court now adverts to the submissions made at the Bar by the learned Senior Counsel for the accused one after another:

I Gagan Bothra has no locus standi to depose:

34 The learned Senior Counsel contended that Gagan Bothra was not competent to give evidence on behalf of his father Mukanchand as he was a minor in 2002 when the transactions took place. In this regard, reliance was placed on the judgment of the Supreme Court in *A.C.Narayanan vs. State of Maharashtra and another*⁶.

35 The learned Senior Counsel meticulously took this Court through certain parts of the evidence of Gagan Bothra and submitted that, to most of the questions posed in the cross-examination, he has stated that he does not know the answer.

36 In a riposte, Gagan Bothra submitted that his date of birth is 05.06.1988 and in 2002, he was 14 years old; as a person hailing from Marwari community, he was assisting his father in the finance business and was well aware of all the transactions. He further submitted that he has withstood the grilling cross-examination of the accused for 11 days and has given satisfactory answers to each of their questions.

37 A prosecution under Section 138 of the NI Act is not a complicated legal proceedings. If a minor boy has seen a murder, he can very well depose as to what he saw, in a Court of law. The law expects the Trial judge to first examine the mental capability of the deponent to understand and answer the questions that may be put to him. In this case, Gagan Bothra was not a minor when he gave evidence before the Trial Court, but was aged 25 years. It is his contention that even when he was a minor, he used to accompany his father and get involved in his

5 (2017) 14 SCC 809

6 (2014) 11 SCC 790

father's business. The question is whether the defence was able to make any dent in the testimony of Gagan Bothra to show that he was not aware of the transactions in question. In the cross-examination on 14.08.2014, he has clearly stated that he was around 15 years in 2002 and that he had personal knowledge about the business transactions his father had. When he was asked as to how the loan was given, he has stated that the loan was given in cash. He has further stated that the loan was given in two instalments of Rs.20 lakhs and Rs.15 lakhs and that he will be able to say the exact dates on seeing the records. When he was further asked as to whether he knows as to what had transpired after this case was filed, he has stated in the affirmative. He has further stated that his father has filed the suit in C.S. No.652 of 2014 in the High Court for recovery of money.

38 From a perusal of the original records called for from the Trial Court, it is seen that the deposition of Gagan Bothra, in the cross-examination spanning to 11 days, runs to around 25 typed pages. However, strangely, in the typed set of papers filed by the petitioners before this Court, they have not filed the full deposition of Gagan Bothra and have filed the deposition given by him on 7 days, suppressing the deposition given on four days, viz., 04.03.2015, 01.04.2015, 08.04.2015 and 15.04.2015. It is indeed a sharp practice to file incomplete deposition and the same is deprecated. This Court is not finding fault with the learned Senior Counsel, for, perhaps, they may not be even aware of this.

39 The learned Senior Counsel drew the attention of this Court to 10 instances in the cross-examination of Gagan Bothra where he has answered that he does not know. Be it noted that, those 10 instances are not relating either to the fact in issue or to any relevant fact. For example, when Gagan Bothra was asked as to what was the income from 2001 to 2004, he has stated that he does not remember the same, but, will be able to answer after seeing the audited accounts. Most of the questions for which he has stated that he does not know, relate to entries in accounts for which he has stated that he does not remember them and that he will be able to see the accounts and answer the questions. In *State of Andhra Pradesh vs. Cheemalapati Ganeswara Rao and another*⁷, the Supreme Court has held in no uncertain terms that a witness who is an Accountant can keep the account books and give evidence in the Court. No witness is expected to undergo memory test in matters relating to Accountancy in cross-examination.

7 AIR 1963 SC 1850

40 Felicitous it is to point out at this juncture that cross-examination has been in Tamil and Gagan Bothra has stated in the cross-examination itself that he does not know to read Tamil, despite which, the answers given by him in respect of the fact in issue militates against the submission of the learned counsel that he was incompetent to depose. The Trial Court and the Appellate Court have appreciated the evidence of Gagan Bothra and have acted on his testimony. In the opinion of this Court, Gagan Bothra has satisfied the test laid down in A.C.Narayanan (supra) and by his answers, it is limpid that he had personal knowledge about the transactions in question and the facts in issue.

II Mukanchand has failed to prove the debt:

41 The learned Senior Counsel submitted that Mukanchand has failed to prove the debt of Rs.35 lakhs and ergo, the prosecution should fail. As alluded to above, Mukanchand has obtained the certified copies of the two promissory notes, the originals of which, he has filed in C.S. No.652 of 2004 and has marked their certified copies as Exs.P.11 and P.12. (Rs. 20 lakhs + Rs.15 lakhs = Rs.35 lakhs). In Rangappa vs. Sri Mohan⁸, the Supreme Court has held that the issuance of a cheque, by itself, will lead to the presumption under Section 139 of the NI Act that it was issued for discharging a liability. In this case, apart from the cheque in question, two promissory notes totalling to Rs.35 lakhs have also been marked as exhibits (Exs.P.11 and P.12) and this Court is unable to understand as to beyond that, what proof is required.

III Complainant has not filed the income tax returns to show that Rs.35 lakhs was given as loan:

42 The learned Senior Counsel took this Court assiduously through the income tax returns of S. Mukanchand Bothra & Sons and demonstrated that the income tax returns show only a sum of Rs.6,70,000/- as outstanding from Mani (A3) and others and not Rs.35 lakhs. He contended that this sum of Rs.6,70,000/- was the subject matter of the prosecution in C.C. No.6787 and 6788 of 2002. He built up his argument further by placing very strong reliance on Krishna Janardhan Bhat vs. Dattatraya G. Hegde⁹. K. Subramani vs. K. Damodara Naidu¹⁰ and Basalingappa vs. Mudibasappa¹¹ to show that a duty is cast upon the complainant to

8 (2010) 11 SCC 441

9 2008 (1) CTC 433

10 (2015) 1 SCC 99

11 (2019) 5 SCC 418

prove the debt by filing his income tax returns when the accused challenges the very debt.

43 Refuting the submissions of the learned Senior Counsel, Gagan Bothra submitted that the accused filed an application under Section 91 Cr.P.C. to call for the income tax returns of Mukanchand Bothra & Sons (HUF) alone, whereas, as financiers, they have four other accounts, viz., Mukanchand Bothra (individual account), his wife (individual account), his daughter (individual account and his son (individual account); the sum of Rs.35 lakhs was taken from all these accounts and given to the Rajiv Gandhi Trust in 2002 for which the Trust executed two promissory notes; had the accused called for the income tax returns of the other four accounts also, it would have been evident that the debt has been shown in the returns.

44 This Court gave its anxious consideration to the aforesaid rival submissions. In the cross-examination on 18.02.2015, Gagan Bothra has clearly stated that a sum of Rs.35 lakhs has been drawn from the accounts of his family members and from the account of the Hindu Undivided Family and has been given to the Rajiv Gandhi Trust (A1). Basically, this Court should bear in mind the salient legal principle that the burden of establishing the guilt of the accused is on the prosecution, but, that theory cannot be stretched so far, as to hold that the prosecution must lead evidence to rebut all possible defences that can be raised by the accused during trial. (See *Bharat Singh vs. State of Uttar Pradesh*¹²). In the aforesaid three cases relied on by Mr. B. Kumar, learned Senior Counsel, the Supreme Court has not held as a thumb rule that the complainant should prove the debt beyond any pale of doubt by showing the source of income even though the execution of the cheque is admitted by the accused. The Supreme Court has not held so, nor will it hold so in the future as well, unless Section 139 of the NI Act is amended or repealed.

45 In *Krishna Janardhan Bhat* (supra), Krishna Janardhan Bhat and R.G. Bhat were jointly running a business and at that time, Krishna Janardhan Bhat had given a power of attorney to R.G. Bhat and had also given certain signed cheques for business purposes. Some dispute arose between them, pursuant to which, R.G. Bhat handed over the signed cheques to his brother-in-law Hegde, who, in turn, prosecuted Krishna Janardhan Bhat under Section 138 of the NI Act. In that case, after receiving the statutory notice, a reply notice was given by Krishna Janardhan Bhat narrating the circumstances under which the impugned cheque had gone into the hands of Hegde. On those facts, the Supreme

12 (1973) 3 SCC 896

Court held that it was incumbent upon Hegde to prove that he had the necessary source of income to give the loan.

46 In K. Subramani (supra), the complainant and the accused were working as teachers in a Government college and it was alleged that the complainant had given a loan of Rs.14 lakhs in cash to the accused, for which, the accused gave the impugned cheque. In that case, 2 Court witnesses were examined and the accused examined himself as D.W.1 and marked Exs.D1 to D5. The judgment and order of acquittal passed by the Trial Court was reversed by the High Court. When the matter was appealed against before the Supreme Court, the judgment and order of the High Court was reversed and the judgment and order of the Trial Court restored on the ground that the complainant had failed to prove the source of income.

47 So also in Basalingappa (supra), the judgment and order of acquittal passed by the Trial Court was reversed by the High Court and the accused was convicted. While dealing with the appeal of the accused, the Supreme Court found that the accused had filed Exs.D1 to D3 repudiating the transaction and had rebutted the presumption under Section 139 of the NI Act by raising a probable defence with regard to the financial capacity of the complainant, who was a retired employee of Karnataka State Transport Corporation, to give a huge loan of Rs.6 lakhs in cash to the accused.

48 On a careful analysis of the facts in Krishna Janardhan Bhat (supra), K. Subramani (supra) and Basalingappa (supra), this Court is able to deduce that the said three cases are not for the proposition that the complainant should prove in all cases that he had the means to give loan to the accused, notwithstanding the fact that the accused had admitted the issuance of the cheque. Very recently, the Supreme Court, in Rohitbhai Jivanlal Patel vs. State of Gujarat and another¹³, has observed as under:

"21. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts

and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the source of funds for advancing loan to the accused-appellant. The aspect relevant for consideration had been as to whether the accused-appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence.”
(emphasis supplied)

49 In *Bir Singh* (supra), the Supreme Court has considered *Krishna Janardhan Bhat* (supra) in paragraph no.29 and has held as under:

“29. In *Krishna Janardhan Bhat v. Dattatraya G. Hegde* [*Krishna Janardhan Bhat v. Dattatraya G. Hegde*, (2008) 4 SCC 54 : (2008) 2 SCC (Cri) 166], cited on behalf of the respondent-accused, this Court reaffirmed that Section 139 of the Act raises a presumption that a cheque duly drawn was towards a debt or liability. However, keeping in view the peculiar facts and circumstances of the case, this Court was of the opinion that the courts below had approached the case from a wholly different angle by wrong application of legal principles.”

50 At this juncture, It may be apposite to refer to the following sapient passage in *Charan Singh and others vs. State of Punjab*¹⁴, wherein, it has been held that in Criminal law, decided cases can be of help if there be a question of law like admissibility of evidence and if the question be about the applicability of some general rule of evidence and that criminal cases cannot be put in a strait jacket:

“32. In the context of what value should be attached to the statements of the witnesses examined in this case, our attention has been invited by the learned Counsel for the appellants to a number of authorities. We have refrained from referring to those authorities because, in our opinion, reference to those authorities is rather misplaced. The fate of the present case like that of every other criminal case depends upon its own facts and the intrinsic worth of the evidence adduced in the case rather than what was said about the evidence of witnesses in other decided cases in the context of facts of those cases. The question of credibility of a witness has primarily to

14 (1975) 3 SCC 39

be decided by referring to his evidence and finding out as to how the witness has fared in cross-examination and what impression is created by his evidence taken in the context of the other facts of the case. Criminal cases cannot be put in a strait jacket. Though there may be similarity between the facts of some cases there would always be shades of difference and quite often that difference may prove to be crucial. The same can also be said about the evidence adduced in one case and that produced in another. Decided cases can be of help if there be a question of law like the admissibility of evidence. Likewise, decided cases can be of help if the question be about the applicability of some general rule of evidence e.g. the weight to be attached to the evidence of an accomplice. This apart, reference to decided cases hardly seems apposite when the question before the court is whether the evidence of a particular witness should or should not be accepted." (emphasis supplied)

Insistence on the complainant to prove the source of income, albeit Section 139 of the NI Act would arise in a case where the Court finds that the accused has, by preponderance of probability, discharged the burden under Section 139 of the NI Act. In this case, two promissory notes signed by Mani (A3) have been executed by the Rajiv Gandhi Trust (A1) in favour of Mukanchand. Now, let us analyse the profile of the parties to this litigation.

51 The accused in this case are not poor illiterates and bonded labourers hailing from a far flung hamlet who have been caught in a debt trap set by an affluent Sowcar. Contrarily, Anbarasu (A2) is a frontline politician who has founded the Rajiv Gandhi Trust (A1) and wields sufficient influence in the society. The complainant in this case is a professional financier. To say that the accused group were intimidated by Mukanchand to execute the promissory notes and cheques under threat and coercion defies credulity. Of course, that is also not the case of the accused. Their case is one of simple denial of the very debt itself. It is not a case where the accused had given a stop payment request to their banker, but, a case of return of the cheque on the ground of "insufficiency of funds".

52 Gagan Bothra brought to the notice of this Court the complaint given by Mani (A3) to the police which formed the registration of the FIR in Cr. No.548 of 2006 and submitted that even in that complaint, there is no mention that the impugned cheque bearing no.578202 was given as security to Mukanchand which he has misused. The admissions of Mani (A3) in the FIR

(Ex.P.13) can be used against him under Section 21 of the Evidence Act. In that complaint, he has admitted that a sum of Rs.21 lakhs was borrowed from Mukanchand for the purpose of construction of college. The said complaint has been given by Mani (A3) in the capacity of Managing Trustee of the Rajiv Gandhi Trust (A1). He has referred to several cheque numbers that have been given as security to Mukanchand, but, significantly, the cheque bearing no.578202 (Ex.P.1) - impugned cheque, does not find place therein. That apart, Mani (A3), even in the complaint, has stated that since Arul Anbarasu (A9) is contesting the election in Sholingur constituency, Mukanchand, under the instigation of someone having vested interest, has given wide publicity to tarnish the reputation of Anbarasu (A2) and also his son Arul Anbarasu (A9) to see that Arul Anbarasu (A9) is defeated in the ensuing election. This admission of Mani (A3) is in consonance with the specific case of Mukanchand that the impugned cheque for Rs.35 lakhs was given to him in order to purchase peace after he wrote to the Congress high command to dissuade them from giving seat to Arul Anbarasu (A9). Across the Bar, Gagan Bothra submitted that on this frivolous complaint given by Mani (A3), his father Mukanchand was arrested and remanded to custody. If what Gagan Bothra says is true, then, the accused will have to perforce reap for what they had sown, for, that is the law of nature. Be that as it may, this Court has no reasons to hold that Mukanchand has not proved the debt.

IV Issuance of the impugned cheque is barred by limitation:

53 The learned Senior Counsel for the accused contended that the debt was of the year 2002 and the impugned cheque was given in 2006 and therefore, the cheque given for a time-barred debt cannot be the foundation for a prosecution under Section 138 of the NI Act. This argument deserves to be stated only to be rejected. Concededly, Mukanchand has filed a civil suit in C.S. No.652 of 2004 for recovery of a sum of Rs.35 lakhs on the two promissory notes in 2004 itself, which is within the period of limitation and the suit is pending even now. Filing of the suit stops the period of limitation from running. According to Mukanchand, in order to purchase peace, the impugned cheque for Rs.35 lakhs was given in April 2006, which has given him a fresh cause of action for founding a prosecution under Section 138 of the NI Act pursuant to the dishonour of the said cheque. The argument on the debt being time barred does not cut ice with this Court and accordingly, this Court has no hesitation in holding that the impugned cheque was not towards a time-barred debt, but was towards a live debt and has given a new cause of action for Mukanchand to initiate a prosecution.

54 At this juncture, it may be necessary to answer yet another argument advanced by the learned Senior Counsel, who submitted that Mukanchand has already filed a suit for recovery of Rs.35 lakhs in 2004 and if the present prosecution in C.C.

No.11127 of 2006 is allowed and Rs.35 lakhs is awarded to him, it would amount to double payment. The submission of the learned Senior Counsel that a civil suit and a prosecution under Section 138 of the NI Act are akin to each other is legally fallacious. The ambit and scope of both are different. While the former, as the name itself implies, is civil in nature, the latter is penal in nature. Section 138 NI Act prosecution is not intended for money recovery, but, to instill fear in the mind of the drawer of a cheque to ensure that cheques are not indiscriminately issued. In a given case, the Court can merely sentence the accused to imprisonment till the raising of the Court without ordering any compensation. If any amount is paid by the accused to the complainant in a prosecution under the NI Act, that can definitely be given credit in the execution of a money decree.

V Vicarious liability on Anbarasu (A2):

55 The learned Senior Counsel placed reliance on the averments in the Trust Deed (Ex.P.14) dated 20.09.2001 of the Rajiv Gandhi Trust (A1) and submitted that no vicarious liability can be fastened on Anbarasu (A2), because, he was only an Honorary Chairman and that the Trust Deed itself says that Mani (A3) was the Managing Trustee. This Court carefully perused the Trust Deed (Ex.P.14). The preamble portion of the Trust Deed itself refers to Anbarasu (A2) as the Author and Founder Trustee of the Trust. The Trust Deed, no doubt, says that Anbarasu (A2) is an Honorary Chairman, which, according to this Court is a misnomer. Unlike a business enterprise where its Managing Director will have remuneration, the Trustees cannot draw remuneration from the Trust funds. They may only draw some actual expenses incurred by them for the benefit of the Trust. Therefore, there is no question of a paid Trustee or Honorary Trustee in matters of Trust. Clauses 9 and 11 of the Trust Deed very clearly state as under:

"9. The Honorary Chairman as a Trustee shall hold office till his life time. If vacancy arises due to his resignation or otherwise, in his place, another person in his family shall be inducted as Trustee.

11. The Board or the Managing Trustee shall not arbitrarily remove any Trustee. However, the Board shall have the power to remove any Trustee if he is found guilty of acting against the interest of the Trust by due process of law, or by unanimous decision of the Board.

In such an event, after the removal, only a member from the family of Mr. Mani or Mr. R. Anbarasan may be inducted in his/her place. (emphasis supplied)

These clauses themselves show the overarching power and hold of Anbarasu (A2) in the affairs of the Rajiv Gandhi Trust (A1).

VI Mani (A3), in the FIR (Ex.P.13), has stated that he has borrowed in his individual capacity:

56 The learned Senior Counsel contended that Mani (A3) had borrowed the money in his individual capacity and not for the Trust as could be seen from the averments in the FIR (Ex.P.13). A reading of the FIR (Ex.P.13) shows that it has been given by Mani (A3) in the capacity of the Managing Trustee of the Rajiv Gandhi Trust (A1) and that he has clearly stated that a sum of Rs.21 lakhs was borrowed from Mukanchand for the purpose of construction of college building. Of course, he has stated that he has repaid the sum of Rs.21 lakhs, but, those averments are admissions which cannot be used in favour of the maker. It is trite that under Section 21 of the Evidence Act, admission of a party can be used only against him and it can be used by him only under certain circumstances enumerated therein, which circumstances do not exist in the case at hand. This Court perused the complaint in C.C. No.6788 of 2002 (Ex.D.1). In that complaint (Ex.D1), Mukanchand has clearly stated that in order to pay the due amount as a part of liability, the accused had issued the cheque dated 09.09.2002 for an amount of Rs.6 lakhs. Therefore, that the cheque for Rs.6 lakhs and the cheque for Rs.50,000/- have been given towards part liability and not in discharge of the whole liability is manifest.

57 Be that as it may, in this case, 2 promissory notes for Rs.20 lakhs and Rs.15 lakhs have been executed in favour of Mukanchand. The promissory notes have been signed by Mani (A3) for and on behalf of the Rajiv Gandhi Trust (A1). The rubber stamp of the Rajiv Gandhi Trust (A1) is available in the promissory notes as well in the impugned cheque. The statutory notices sent to the accused were returned on the ground "not claimed". In their Section 313 Cr.P.C. statement also, the accused have not explained the circumstances under which the impugned cheque came into the hands of Mukanchand.

VII Mukanchand has not shown the loan in his income tax account and therefore, it should be black money and as such, Section 23 of the Contract Act would apply.

58 The learned Senior Counsel contended that Mukanchand has not produced his income tax returns to show that Rs.35 lakhs was given as loan to the Rajiv Gandhi Trust (A1) and has not paid tax for it and hence, the contract itself is void. Inviting the attention of this Court to Section 23 of the Contract Act, it was contended that the very contract itself is void. In this case, as has been expatiated in the preceding paragraphs, the

debt is founded on two promissory notes. It was the accused who selectively filed an application under Section 91 Cr.P.C. for production of the income tax returns of S. Mukanchand & Sons (HUF), leaving out the income tax returns of the other family members. In this connection, Gagan Bothra has clearly explained that the other members of their family have pooled in their resources to mobilise Rs.35 lakhs. When a person wants loan from another, he is not required to investigate into the means by which his creditor had amassed wealth. If the accused in these cases had wanted to be puritans, they should have told Mukanchand at the threshold itself that, they being puritans, will obtain loan only from a person who is also a puritan and who has disclosed all his earnings to the Income Tax Department. In the opinion of this Court, after having obtained a loan, it does not behove of the debtor to repudiate it on the ground that the creditor had earned the money through illegal means. In other words, after having borrowed from a compassionate harlot, can the borrower deny repayment of loan on the ground that she had earned the money immorally and illegally? The answer to this question can only be an emphatic "No" and nothing else. In short, a thief is not entitled to legitimately rob a dacoit.

59 In view of the foregoing discussion, this Court has no reasons to interfere with the concurrent findings of facts arrived at by the two Courts below.

Ex consequenti, all the three criminal revisions fail and accordingly, stand dismissed. Connected Crl.M.Ps. are closed. The Trial Court is directed to issue warrant to secure the accused and commit them to prison to undergo the period of sentence.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

cad

To

1 The IV Additional Sessions Judge,
Chennai.

WEB COPY

2 The IV Fast Track Judge,
Chennai.

3 The Public Prosecutor,
High Court of Madras,
Chennai 600 104.

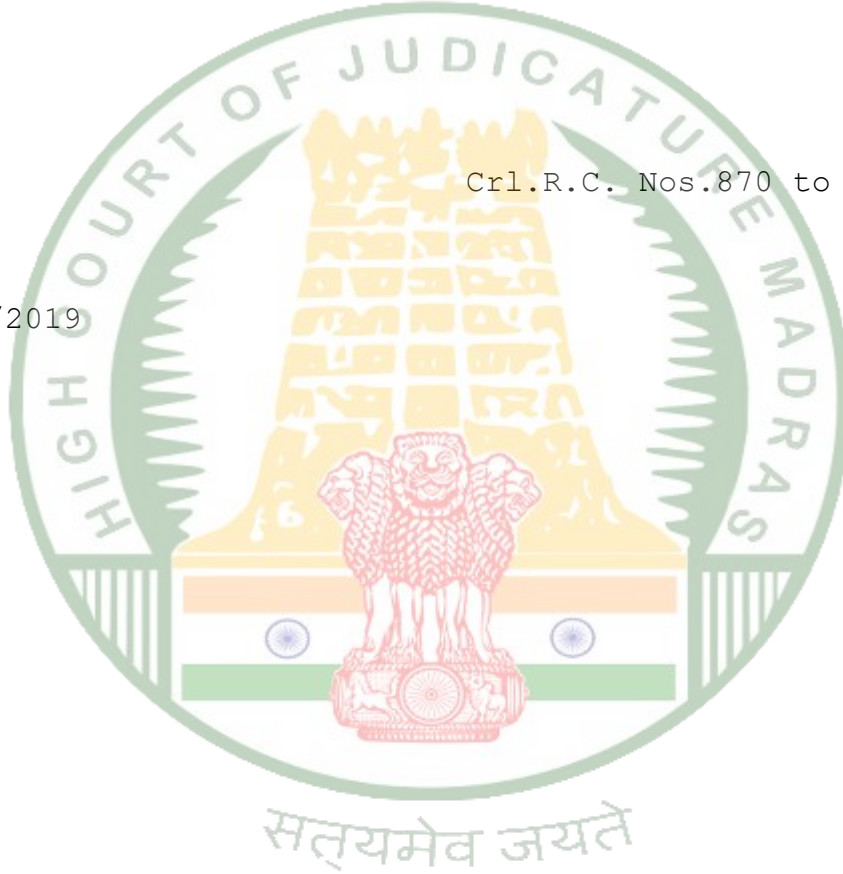
+1cc to Mr.Aruna Elango, Advocate Sr.64357

+2cc to Mr.G.Muthukumar, Advocate Sr.62995

+2cc to Mr.M.Gagan Bothra Party in person, Sr.63492

Crl.R.C. Nos.870 to 872 of 2017

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