BAIL SLIP

Kombu Maharaja, Male, aged 35 years, S/o, Thangaraj, Petitioner/Petitioner/Appellant/Accused No.1 was released on bail of this Court dated 23.12.2009 made in MP(MD)No.4 of 2009 in CRL RC(MD) No.659 of 2009.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	01.07.2019
Date of Judgment	18.10.2019

CORAM
THE HONOURABLE MRS. JUSTICE **T.KRISHNAVALLI**

Crl.RC(MD)No.659 of 2009

Kombu Maharaja : Petitioner/Appellant/A1

Vs.

State represented by
CCIW-CID,
Thoothukudi,
Crime No.4 of 2000 : Respondent/Respondent/ Complainant

Prayer: Criminal Revision has been filed under Section 397 r/w 401 of the Code of Criminal Procedure, against the judgment of the Additional Sessions Judge/Fast Track Court, Thoothukudi, dated 26.06.2007, passed in C.A.No.114 of 2004, confirming the judgment of the Judicial Magistrate No.II, Tirunelveli, passed in C.C.No.40 of 2002, dated 29.03.2004.

For Petitioner : Mr.T.A.Ebenezer

For Respondent : Mr.A.Robinson, Government Advocate (Crl.side)

J U D G M E N T

The Criminal Revision is directed against the judgment passed by the Additional Sessions Judge/Fast Track Court, Thoothukudi, dated 26.06.2007, in C.A.No.114 of 2004, confirming the judgment of the Judicial Magistrate No.II, Tirunelveli, passed in C.C.No.40 of 2002, dated 29.03.2004.

2.The case of the prosecution is that A1 is the President of Ottapidaram Primary Agricultural Co-operative Bank and A2 to A5 are the Directors and in between 31.10.1997 and 16.08.1999, they were committed misappropriation of Rs.1,45,005.20/-. It is further case of the prosecution is that on 08.10.1998, 15.10.1998 and 13.01.1999, A1 withdrawn Rs.45,000/- from the bank for the purchase of crackers and sugar cane with the approval of A2 to A5, but he has not purchased anything and thereby committed misappropriation.

3.The trial court, based on the materials available on record, both oral and documentary convicted the petitioner for the offence under Section 409 IPC (2 counts) and sentenced him to undergo 1 year RI and to pay a fine of Rs.1,000/- each, in default to undergo 2 months rigorous imprisonment. Aggrieved by the judgment of the trial court, the petitioner/A1 preferred appeal before the Sessions Judge, Thoothukudi, which was also confirmed by the first appellate court. Hence, the petitioner/A1 is before this court.

4.Heard both sides and perused the materials available on record.

5.The contention raised on the side of the revision petitioner/A2 is that the petitioner has remitted Rs.1,09,500/- to his account and the allegations against the petitioner is that he has not produced vouchers and if the vouchers are produced, no offence will be made out and there was no dishonest intention on the part of the petitioner and there are discrepancies in the evidence of the prosecution witnesses and prays that the revision petitioner/A2 is entitled to acquittal.

6.PW4 is the Enquiry Officer, who conducted the enquiry as against the accused. PW4 deposed that as per the Resolution, dated 19.12.1995, A1 was appointed as President of the Co-operative Bank and served as President till 09.09.1999 and as per Rule 36, he was given power to supervise all the activities of the Co-operative Bank and from 31.10.1997 and 16.08.2009, A1 received Rs.1,45,005/- from the Society by way of credit bill, but he failed to pay into the Bank Account and misappropriated the above amount and from the Bank, he received Rs.45,000/- for purchasing crackers and sugar cane, but he has not purchased the same and misappropriated and for that, A2 to A5 are collusive.

7.The learned counsel appearing for the petitioner/A1 argued that A1 issued vouchers for the advance amount received by him and the amount received by A1 was entered into the Day Book under heading of due and when the amount repaid by A1 was restored as credit as against the due to entry and after suspension of A1, it is not possible to pay the amount towards the advance amount already received and there was no misappropriation on the part of the A1 and prays that A1 is entitled to acquittal.

8.PW4 deposed that as per Ex.P14, P7, P15, P8, P24 to P31, A1 issued debit slip and recovered the amount of Rs.48,000/-, 10,525.52/- and 40,000/-, but A1 failed to repay the said amount. PW2 also deposed that A1 received amount by way of debit slip. Further, PW4 and PW2 deposed that A1 received Rs.25,000/- for purchasing crackers and Rs.20,000/- for purchasing sugar cane, but A1 has not used the above amount for the purchase of crackers and and sugar cane, but he misappropriated it and further, he received

Rs.35,990/- towards advocate fees, but no receipt for the amount received by the concerned Advocate was produced and thereby, A1 misappropriated the amount. It is to be noted that the advance amount received by A1 was entered in the Day Register. But no document was filed to prove that the above amount was used for the purchase of crackers and sugar cane. Hence, on careful perusal of the evidence of PW1 and PW4 and Exs.P14 and P15, it reveals that A1 received amount by way of debit slip and thereby misappropriated the amount received by him, but he failed to repay it.

9.The learned counsel appearing for the petitioner/A1 argued that A1 is not a public servant and hence, the offence under Section 406 IPC is not made out. For that, the learned counsel for the petitioner/accused submitted a ruling reported in **1990 L.W.Crl.172 (Somasundaram Vs. State rep. By Inspector of Police).** In that case, it has been held as follows:-

> *"To find the petitioner guilty of the offence under Section 409 IPC, he must be a public servant, banker, merchant or agent. There is a plethora of authorities that the President of a Cooperative Society will not be a public servant as defined in Section 21 IPC."*
>
> *The Supreme Court has held that a Cooperative Society is not a statutory body because it is not created by a statute. It is a body created by an act of a group of individuals in accordance with the provisions of a statute. A Co-operative Society is, therefore, not a Corporation established by or under an Act of the Central or State Legislature. Therefore, on the enunciation of law detailed, the petitioner cannot be deemed to be a public servant. If that be so, it is not possible to affirm his conviction for the offence under Section 409 IPC."*

10.In this case, the duties and responsibilities of A1 was stated in Ex.P23. A1 was given power to maintain the Current Account, Savings Account and all other accounts. Hence, it reveals that A1 was given power to maintain all the accounts and he is responsible for the account. It is not denied on the side of the accused. At this juncture, it is necessary to refer Section 409 IPC, which would run thus:-

> *"409.Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with*

1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

11.It is admitted that A1 was given power to manage the Bank Account. Further, in the eye of law, it is held that he is responsible for all the bank account and he is a Banker. When a banker failed to pay the amount already received by him, then the offence under Section 409 IPC is made out.

12.The specific case of the prosecution is that A1 received Rs.45,000/- from the Bank for the purchase of crackers and sugar cane but failed to purchase the crackers and sugar cane and in this regard, a case in Crime No.6 of 1999 was registered as against A1 and four others. No contra evidence was let in on the side of the accused to prove that he purchased the crackers and sugar cane for the amount received by him in the Bank Account.

13.From the evidence of the prosecution witnesses, it reveals that A1 received some amount from the bank for the purchase of crackers and sugar cane, but failed to purchase the same. As per Ex.P23, A1 was given power to maintain all the accounts and manage the Bank Accounts. Hence, he breaches his duties and responsibilities. Hence, the petitioner/A1 is found guilty under Section 409 IPC.

14.Both the courts below, after proper appreciation of the entire materials available on records, had given a concurrent finding, which according this court, it does not require any interference by this court. However, consider the facts and circumstances of the case and also consider the fact that the petitioner is the only breadwinner, the punishment imposed on the petitioner/A1 requires modification and accordingly, the punishment imposed on the revision petitioner/A1 is reduced to 3 months RI.

15. In the result, the criminal revision is **partly allowed.** The punishment imposed on the revision petitioner/A1 for the offence under Section 409 IPC (2 counts) is reduced to 3 **months RI for each count.** In respect of fine amount, the findings of the Courts below are confirmed. The sentences imposed on the revision petitioner/A1 are directed to run concurrently with the sentence imposed in other connected cases viz., Crl.RC(MD)Nos.658 and 673 of 2009. The period of sentence, if any, already undergone by the revision petitioner/A1 shall be given set off under Section 428 of Cr.P.C.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

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To,

1.The Additional Sessions Judge,
Fast Track Court.
Thoothukudi.

2.The Judicial Magistrate No.II,
Tirunelveli.

3.CCIW-CID,
Thoothukudi.

copy to

The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Judgment made in
Crl.RC.(MD)No.659 of 2009
18.10.2019

VB(13.11.2019) 5P 5C