

Bail Slip

The Appellant/Accused namely S. Kadirvel S/o. Sundaramoorthy was released on bail vide order dated 23.09.2013 in CrI.M.P. 1/2013 in CrI.R.C.No.1170 of 2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.02.2020

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CrI.R.C.No.1170 of 2013

S.Kadirvel ...Petitioner/Appellant/Accused

Vs.

Sabaithammal ..Respondent/Respondent/Complainant

Criminal Revision filed under Section 397 r/w 401 Cr.P.C., to set aside the judgment and order dated 30.12.2011 passed in C.C.No.304 of 2011 on the file of the Judicial Magistrate Court (Fast Track Court-Magisterial Level), Vellore, confirmed by judgment and order dated 05.06.2013 passed in C.A.No.24 of 2012 on the file of the Principal District and Sessions Court, Vellore.

For Petitioner : Ms.Zeenath Begum
Amicus Curiae

For Respondent : No appearance

O R D E R

सत्यमेव जयते

This criminal revision has been filed seeking to set aside the judgment and order dated 30.12.2011 passed in C.C.No.304 of 2011 on the file of the Judicial Magistrate Court (Fast Track Court-Magisterial Level), Vellore, confirmed by the judgment and order dated 05.06.2013 passed in C.A.No.24 of 2012 on the file of the Principal District and Sessions Court, Vellore.

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

3. It is the case of the complainant that the accused was well known to her and on the strength of such acquaintance, he borrowed a sum of Rs.60,000/- on 28.09.2009 and executed a promissory note agreeing to repay the amount with interest on demand; when the complainant started demanding the return of the amount, the accused issued a cheque (Ex-P1) dated 07.09.2010 bearing no.532675 drawn on ICICI Bank, Vellore Branch for a sum of Rs.60,000/-; the complainant presented the impugned cheque (Ex-P1) on 07.09.2010, but the same was returned unpaid with the endorsement "Account Closed" vide bank's return memo (Ex-P2) dated 08.09.2010; therefore, the complainant issued a statutory demand notice (Ex-P4) dated 08.10.2010, for which, the accused sent a reply notice (Ex-P7) dated 20.10.2010; since the accused did not comply with the demand, the complainant initiated a prosecution in C.C.No.304 of 2011 before the Judicial Magistrate Court (Fast Track Court-Magisterial Level), Vellore, for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act"), against the accused.

4. Before the trial Court, the complainant examined herself as PW1 and marked seven exhibits.

5. When the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same and did not give any explanation as to the circumstances, under which, the impugned cheque (Ex-P1) issued by him came into the hands of the complainant. On behalf of the accused, one Kuppusamy was examined as DW1. However, no exhibit was marked.

6. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 30.12.2011 in C.C.No.304 of 2011, 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 a sum of Rs.75,000/- as compensation to the complainant.

7. The appeal in C.A.No.24 of 2012 filed by the accused was dismissed by the Principal District and Sessions Court, Vellore, on 05.06.2013.

8. Aggrieved by the concurrent findings of fact arrived at by the Courts below, the accused has preferred the present revision invoking Section 397 r/w 401 Cr.P.C. through M/s.P.Ponpandian, Advocates, who do not have their office in the High Court Campus or near it, but, in Teynampet area, as could be seen from the vakalat filed by them. They have also not given their mobile numbers.

9. Along with this revision, the accused filed M.P.No.1 of 2013 for suspension of sentence and bail. This Court, by order dated 23.09.2013 in M.P.No.1 of 2013 in CrI.R.C.No.1170 of 2013, dispensed with the surrender of the accused before the appellate Court, suspended the sentence and released him on bail pending disposal of the criminal revision.

10. When the matter was taken up for hearing on 31.01.2020, there was representation for the accused. Therefore, this Court directed the matter to be listed on 03.02.2020, under the caption "for dismissal". Even on 03.02.2020, there was no representation for the accused. Therefore, this Court passed the following order:

"On 31.01.2020, there was no representation for the petitioner. Therefore, this Court directed this criminal revision to be listed today under the caption "for dismissal". Today also, there is no representation for the petitioner. Hence, this Court appoints Ms.Zeenath Begum (E.No.494/08) as Amicus Curiae for the petitioner.

2.Post this criminal revision "for orders" on 10.02.2020."

11. Heard Ms.Zeenath Begum, learned Amicus Curiae appearing for the accused. Though notice has been served on the complainant and her name is printed in the cause list, none has entered appearance on her behalf.

12. The learned counsel for the accused submitted that the trial Court and the appellate Court had failed to consider the evidence of Kuppusamy (DW1), who, in his evidence, has stated that the loan was discharged by the accused, and therefore, the accused has discharged the burden under Section 139 of the NI Act. She also submitted that Section 138 of the NI Act will not stand attracted, where, the cheque has been returned on the ground "Account Closed".

13. Before advertng to the submissions made by the learned counsel for the accused, it is 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 Kumar², the Supreme Court has held as under:

"17. As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH

1 (2004) 7 SCC 659

[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. " (emphasis supplied)

14. In the case at hand, the complainant, in his evidence, has stated about the loan of Rs.60,000/- that was taken by the accused on 28.09.2009, the issuance of the impugned cheque (Ex-P1), its presentation and dishonour on the ground "Account Closed", the issuance of the statutory demand notice (Ex-P4), receipt of the reply notice (Ex-P7) and the failure of the accused to comply with the demand. The defence was not able to make any serious dent in the testimony of the complainant in the cross-examination.

15. Kuppusamy (DW1), in his evidence, has stated that he knows the complainant and the accused; the accused has borrowed only a sum of Rs.50,000/- from the complainant and the same has also been paid by him. However, Kuppusamy (DW1) has not stated as to when the sum of Rs.50,000/- was borrowed and when it was repaid by the the accused to the complainant.

16. At this juncture, it may be necessary to allude to the reply notice (Ex-P7) that was sent by the accused. In the reply notice (Ex-P7), the accused has stated as follows:

"2. My client submits that my client admits the averments in para 2 of your notice that he issued a cheque for Rs.60,000/- dated 07.09.2010 of ICICI Bank Limited, Vellore Branch, in the name of your client and also my client already repay the entire amount of the cheque amount.

3. My client denies all the averments in para 3 of your notice that your client presented the said cheque and it was returned due to "Account Closed".

4. My client states that at any point of time, my client was not closed his Bank account. The bank itself suo moto closed my client's bank account.

5. My client states that hence my client is not liable to pay any amount to your client. My client is a debtor and he is preferred to file a Insolvency petition before the competent Court. So my client is not able to pay the sum of Rs.60,000/- to your client. My client is not attracts the penal provision of 420 I.P.C. and Sec. 138 of the N.I.Act. Please advise your client accordingly. Kindly avoid unpleasantness."

From the above extract, it is seen that in paragraph no.2 of the reply notice (EX-P7), the accused has stated that he had already repaid the amount, but, in paragraph no.5, he has stated that he was not able to repay the amount, and therefore, he filed insolvency petition. However, the accused has categorically admitted the issuance of the impugned cheque (Ex-P1) dated 07.09.2010 for Rs.60,000/-. Strangely, the accused has taken a stand that he had not closed the bank account and the bank had suo motu closed his account. As stated above, the accused has not given any explanation, whatsoever, when he was questioned under Section 313 Cr.P.C.

17. As regards the submission of the learned counsel for the accused that Section 138 of the NI Act will not stand attracted in a case, where, the cheque has been returned on the ground "Account Closed", the issue is no more res integra in the light of the authoritative pronouncement of the Supreme Court in Laxmi Dyechem Vs. State of Gujarat and others³.

18. This Court also perused the impugned cheque (Ex-P1) and did not find any suspicious feature therein. Both the Courts below have properly appreciated the evidence of the defence witness Kuppusamy (DW1) and have given cogent reasons for rejecting it.

19. 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 Mohan⁴, even that has not been done in this case.

20. In view of the foregoing discussion, this Court does not find any infirmity in the judgments and orders passed by the Courts below, warranting interference.

21. The learned counsel for the accused pleaded for leniency in the sentence slapped on the accused by the trial Court.

22. Accepting the submission made by the learned counsel for the accused:

(i) the substantive sentence of six months rigorous imprisonment imposed on the accused for the offence under Section 138 of the NI Act is reduced to three months simple imprisonment;

(ii) however, the conviction of the accused of the offence under Section 138, *ibid.*, is confirmed;

(iii) the compensation element as awarded by the trial Court shall remain the same;

3 (2012) 13 SCC 375

4 (2010) 11 SCC 441

(iv) the trial Court is directed to secure the accused and commit him to prison to serve out the remaining period of sentence;

(v) liberty is given to the parties to approach the trial Court under Section 147, *ibid.*, even after the accused is taken into custody;

(vi) 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.1170 of 2013; and

(vii) if any amount has been deposited by the 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 her legal heirs, as the case may be.

Resultantly, this criminal revision is allowed in part to the extent indicated above. This Court places on record its appreciation to Ms.Zeenath Begum (E.No.494/08), learned Amicus Curiae for the accused and directs the Tamil Nadu State Legal Services Authority, Chennai, to pay her a sum of Rs.5,000/- as remuneration.

Sd/-
Assistant Registrar

//True Copy//

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Sub Assistant Registrar

nsd

To

1. The Judicial Magistrate,
(Fast Track Court-Magisterial Level),
Vellore.

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2. The Principal District
and Sessions Judge,
Vellore.

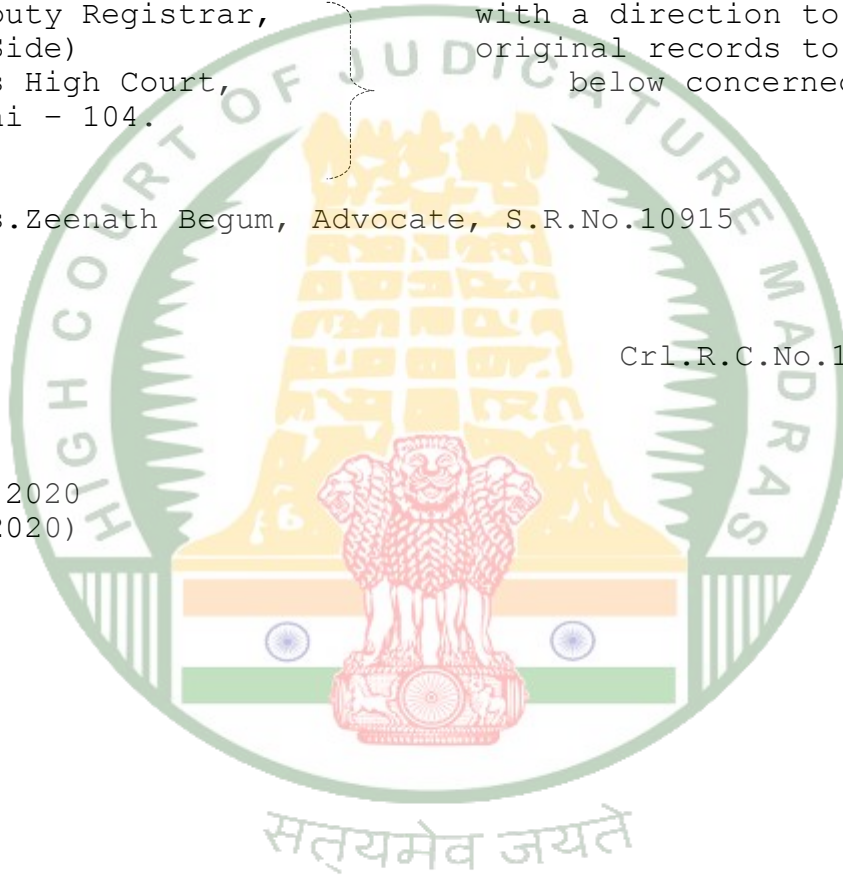
3. The Member Secretary,
Tamil Nadu State Legal
Services Authority,
North Fort Road,
High Court Campus,
Chennai - 600 104.

4. The Deputy Registrar,
(Crl.Side) with a direction to return the
original records to the Courts
Madras High Court, below concerned
Chennai - 104.

+lcc to Ms.Zeenath Begum, Advocate, S.R.No.10915

Crl.R.C.No.1170 of 2013

PVS (CO)
nvi/29.05.2020
SP(16/07/2020)



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