

BAIL SLIP

The Appellant/Accused Viz; Ajay Kaushik S/o.Kanyalal was released on bail as per order passed by this court on 04/11/2013 in Crl.MP.No.1/13 in Crl.R.C.No.1350/13

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED 28.01.2020
CORAM
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
CRL.R.C.No.1350 of 2013

Ajay Kaushik ... Petitioner/
Accused
Vs
R.Sasikumar ... Respondent/
Complainant

Criminal Revision preferred under Section 397 read with 401 Cr.P.C. to set aside the judgment and order dated 28.06.2013 passed by the III Additional District and Sessions Judge, Salem in C.A.No.76 of 2011 partly confirming the judgment and order dated 05.08.2011 passed by the Judicial Magistrate No.IV, Salem in C.C.No.176 of 2006.

For Petitioner : Ms.D.Sathya
for Ms.Zeenath Begum
For Respondent : Mr.D.Shivakumaran

O R D E R

This Criminal Revision has been preferred challenging the judgment and order dated 28.06.2013 passed by the III Additional District and Sessions Judge, Salem in C.A.No.76 of 2011 partly confirming the judgment and order dated 05.08.2011 passed by the Judicial Magistrate No.IV, Salem in C.C.No.176 of 2006.

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, on 01.12.2005, the accused took a hand loan of Rs.8,50,000/- and on the same day, gave a cheque dated 01.12.2005 (Ex.P1) bearing No.8775522 drawn on Lakshmi Vilas Bank, Thirukovilur branch, but requested the complainant to present the cheque in the first week of March

2006; the complainant presented the said cheque on 11.03.2006 and it was returned on 18.03.2006 with the endorsement "account closed" (vide return memo Ex.P2); the complainant issued a statutory demand notice dated 12.04.2006 (Ex.P4), which returned unserved and the returned cover was marked as Ex.P5; therefore, the complainant initiated a prosecution in C.C.No.176 of 2006 before the Judicial Magistrate No.IV, Salem for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "the NI Act") against the accused.

4.On appearance, the accused was questioned under Section 251 Cr.P.C. and he denied the accusation.

5.The complainant examined himself as P.W.1 and marked Exs.P1 to P6.

6.When the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. The accused examined himself as D.W.1 and marked Exs.D1 to D24.

7.After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 05.08.2011 in C.C.No.176 of 2006, 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. Challenging the conviction and sentence, the accused filed C.A.No.76 of 2011, which was partly allowed by the III Additional District and Sessions Judge on 28.06.2013 by confirming the conviction but, reduced the substantive sentence of imprisonment from one year to nine months simple imprisonment, challenging which, the accused has filed the present revision under Section 397 read with 401 Cr.P.C.

8.Heard Ms.D.Sathya, learned counsel for the accused and Mr.D.Shivakumaran, learned counsel for the complainant.

9.This Court is aware of the legal position that the revisional Court cannot reappreciate the evidence like an appellate Court, but, where it is shown that there has been gross misappreciation of evidence by the two Courts below, the power of this Court to go into the evidence has been preserved by Section 401(1) Cr.P.C.

10.The complainant, in his evidence, has spoken about the hand loan of Rs.8,50,000/- that was given to the accused on 01.12.2005, the issuance of the impugned cheque for the said sum on the same day i.e. on 01.12.2005, the presentation of the impugned cheque on 11.03.2006, its dishonour on 18.03.2006 on the ground "account closed", issuance of legal notice dated 12.04.2006, the return of the postal cover and the filing of the prosecution.

11.The provisions of Section 138 of the NI Act will stand attracted, even in a case where the cheque is returned on the ground "account closed" (See NEPC Micon Ltd. and Others Vs. Magma Leasing Ltd. [(1999) 4 SCC 353]). In this case, the accused has not denied his signature in the cheque and therefore, the presumptions under Sections 118 and 113 of the NI Act will come to the aid of the complainant. As held by the Supreme Court in Rangappa Vs. Sri Mohan [(2010) 11 SCC 441], the accused can discharge these presumptions by preponderance of probability and is not required to prove beyond reasonable doubt.

12.It is apposite to discuss the defence of the accused, who in his evidence, has stated that, he is a native of Gujarat and settled in Mumbai; he is a proprietor of Karan Traders and into the business of acquiring spinning mills in Tamil Nadu and that, he has acquired about 19 spinning mills; since Coimbatore is a cotton hub, he opened an office of Karan Traders in Coimbatore in No.414-C, Manchester Towers, Avinashi Road; he appointed one Santhanam as his Manager in the office; Karan Traders acquired Sri Vasavi Spinning Mills in Thirukovilur, Villupuram District, to run which, he opened an account in Lakshmi Vilas Bank, Thirukovilur; he appointed one Sadhasivam, S/o.Sundaram, as his representative to manage the mills; in order to meet the day-to-day expenses to run the mill, he handed over blank, but duly signed cheques of Karan Traders relating to its bank account in Lakshmi Vilas Bank, Thirukovilur Branch with Sadhasivam; but, in December 2005, the lease of Sri Vasavi Spinning Mills was terminated and so, he was not able to pay salary to Sadhasivam; he had left his Coimbatore office with Santhanam and Thirukovilur mills with Sadhasivam and had gone to Bombay and Gujarat for other business purposes; at that time, both Santhanam and Sadhasivam started misappropriating funds and on coming to know of it, he dismissed both of them from service; Sadhasivam misused one cheque bearing No.877523 and filled it up for Rs.80,000/- and presented it for clearance; that cheque was returned with the endorsement "funds insufficient"; Sadhasivam issued a statutory demand notice dated 01.04.2006 to the accused

to his Ahmedabad address (Ex.D14); on coming to know of this, he realised that Sadhasivam and Santhanam are colluding to cheat him and so, he closed his bank account in Lakshmi Vilas Bank, Thirukovilur Branch; thereafter, Sadhasivam and Santhanam have set up the complainant herein, given him the impugned cheque bearing No.877522, which was presented on 11.03.2006; as the accused had closed the bank account, this cheque was returned with the endorsement "account closed"; he filed a police complaint dated 17.06.2006 at Kumarapalayam Police Station making allegations against Sadhasivam and the complainant herein; during the police enquiry, Sadhasivam, came for settlement and returned the original cheque No.877523 (Ex.D20) along with other blank cheques which were marked as Exs.D17, D18 and D19; the Memorandum of Understanding entered into between the accused and Sadhasivam was marked as Ex.D21.

13.Apart from the above defence, the accused has specifically taken a defence that he was not in Coimbatore on 01.12.2005, the date on which, he is alleged to have borrowed Rs.8,50,000/- from the complainant herein and that, he was in Mumbai from 26.11.2005 to 04.12.2005.

14.To prove this fact, the accused marked Exs.D1 to D12 viz. his air tickets, petrol bills for fuelling his car in Mumbai, hotel bills of Mumbai, train tickets, to show that he had travelled to Mumbai and Ahmedabad; his mobile phone records for the said period, to show that the tower location showed only Maharashtra and Gujarat and not Tamil Nadu.

15.The complainant was cross-examined extensively by the accused and the complainant admitted that he did not obtain even a shred of paper like promissory note etc. from the accused while giving such a huge hand loan of Rs.8,50,000/- on 01.12.2005. The complainant was challenged in the cross-examination about his means to give such a huge loan and therefore, he marked his income tax return as Ex.P6. The income tax return shows that the complainant's annual income was only Rs.3 lakhs after all the deductions.

16.Mr.Shivakumaran, learned counsel for the complainant submitted that in the income tax return, the complainant has shown sundry debts at Rs.10,00,000/- which would include the debt of Rs.8,50,000/- that was given to the accused. Learned counsel for the accused submitted that the income tax return

does not disclose the name of the accused and the stray averment "sundry debts" will not lead to the inference that, the sum of Rs.8,50,000/- that was allegedly given to the accused, was included in it.

17. There appears to be some force in the submission of the learned counsel for the accused. The complainant is not a financier. He has stated that he is a dealer in waste cotton. Admittedly, the complainant did not obtain any document like promissory note etc. from the accused, when he gave the hand loan of Rs.8,50,000/- on 01.12.2005. A mere statement in the income tax return that there are sundry debts for Rs.10,00,000/- without supporting evidence, will not be accepted by the income tax officer. The income tax officer will insist the assessee to show some proof to justify the debts.

18. As stated above, the complainant had not obtained any document from the accused. In the absence of materials to establish the debt, the mere statement of the complainant that he has sundry debts for Rs.10,00,000/- in the income tax return, cannot lead to the inference that it included the debt of Rs.8,50,000/- allegedly due from the accused. In *Bir Singh Vs. Mukesh Kumar* [(2019) 4 SCC 197] and *Uttam Ram Vs. Devinder Singh Hudan & Another* [(2019) 10 SCC 287], the Supreme Court has clearly held that it is not necessary for the complainant to prove the debt and the burden is on the accused to prove that there was no debt.

19. In the cross-examination of the complainant, he first stated that the impugned cheque was filled up by the accused. Little later, in the course of further cross-examination, he stated that the impugned cheque was filled up by Santhanam. This exactly is the case of the accused. The complainant is from Salem. The complainant has stated that he voluntarily went from Salem to Coimbatore to the office of Karan Traders on 01.12.2005 and gave the hand loan of Rs.8,50,000/- to the accused in the presence of Santhanam, whereas, the materials adduced by the accused reasonably show that he was not in Coimbatore on 01.12.2005.

20. The impugned cheque bears the number 877522 and the cheque for Rs.80,000/- (Ex.D20) with which, Sadhasivam issued the statutory demand notice bears cheque No.877523. The accused has marked the statement of accounts from 01.04.2005 to

08.03.2006 to show that Sadhasivam has been withdrawing monies on various dates from that account and that is why, the accused had to close the account to save himself from further loss. The theory of the complainant that a huge loan of Rs.8,50,000/- was given to a native of another State, without any security on 01.12.2005 and interest free and that, on the same day, the impugned cheque for the said amount was given, appears little unbelievable.

21.In the cross-examination, the complainant has admitted that he knows Santhanam very well. This also probabalises the case of the accused that Santhanam, Sadhasivam and the complainant were acting in tandem, by misusing the cheques that were entrusted to them for business purposes. In the opinion of this Court, the accused has discharged the burden under Section 139 of the NI Act satisfactorily and the two Courts below have failed to appreciate the evidence on record in the proper perspective.

As a result, this criminal revision stands allowed. The judgments and orders dated 05.08.2011 and 28.06.2013 passed by the trial Court and the appellate court respectively are set aside and the accused is acquitted of the charge under Section 138 of the NI Act. The bail bond shall stand discharged and the fine amount paid if any, shall be refunded. Registry is directed to transmit the original records if any, to the respective Courts forthwith.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

gya

To

1.III Additional District and Sessions Court
Salem

2.Judicial Magistrate No.IV
Salem

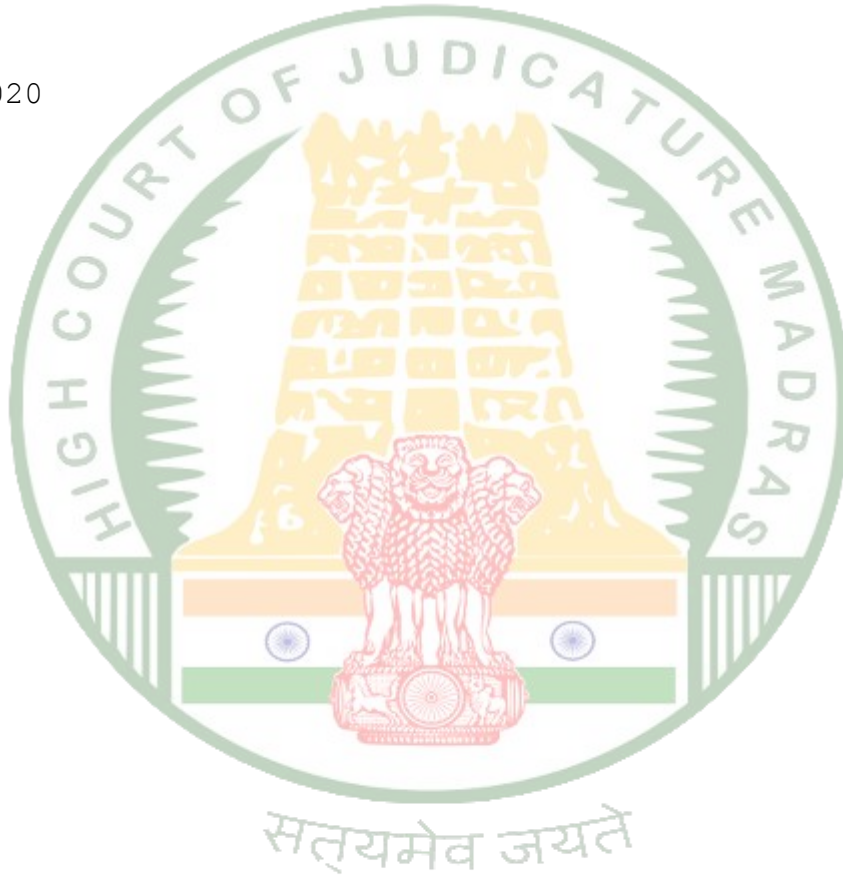
3.The Chief Judicial Magistrate
Salem

4.The Deputy Registrar
Criminal Side
High Court, Madras

+1 cc to M/s.Zeenath Begum Advocate sr6758

CRL.R.C.No.1350 of 2013

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