

Bail Slip

The Appellant in CrI.R.C.484/2013 viz Nishad Mathew S/o. K.T. Mathew, aged 23 years was directed to be released on bail as per order of this Court dated 16.04.2013 and made in M.P. No. 1/2013 in CrI.R.C.484 of 2013 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.01.2020

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

CrI. R.C. No.484 of 2013
and
CrI.M.P.No.11455 of 2019

1.Nishad Mathew

2.Hotel Sea Gate,
rep. by Nishad Mathew
Pethadipalam, S. Kalamassery
Ernakulam, Kerala.

... Petitioners

Vs.

1.Easwaramoorthy (deceased)
2.Radhika
3.Ramgautham
4.Sowmya
5.Mylathal

... Respondents

[Respondents 2 to 5 being the legal heirs of late Easwaramoorthy (R1) are impleaded as per order in CrI.M.P.11453 of 2019 in CrI.R.C.484 of 2013 dated 16.08.2019]

Prayer: Criminal Revision Case filed under Section 397 r/w. 401 Cr.P.C., against the judgment, dated 25.02.2013, passed by the Additional District and Sessions Judge, Coimbatore, in C.A.No.224 of 2012, confirming the judgment of conviction and sentence, dated 04.07.2012, passed by the Judicial Magistrate, Fast Track Court at Magisterial Level No.II, Coimbatore, in C.C.No.67 of 2011.

For Petitioners : Mr.T.R.Ravi
For Respondents : Mr.Ramesh Kumar Chopra

O R D E R

This Criminal Revision Case has been filed against the judgment, dated 25.02.2013, passed by the Additional District and Sessions Judge, Coimbatore, in C.A.No.224 of 2012, confirming the judgment of conviction and sentence, dated 04.07.2012, passed by the Judicial Magistrate, Fast Track Court at Magisterial Level No.II, Coimbatore, in C.C.No.67 of 2011.

2.For the sake of convenience, the petitioners and the 1st respondent will be referred to as accused and complainant, respectively.

3.It is the case of the complainant that Nishad Mathew (A1), who is a partner in Hotel Sea Gate (A2), had borrowed Rs.30,00,000/- on 20.08.2010; towards the said debt, he (A1) issued a cheque dated 03.01.2011 (Ex.P1) for Rs.30,00,000/- drawn on Axis Bank, Aluva Branch, from the account of Hotel Sea Gate (A2) and the cheque was signed by Nishad Mathew (A1) in the capacity of Partner/Authorised Signatory of Hotel Sea Gate (A2); the complainant presented the said cheque at IDBI Bank, Coimbatore, and the same was dishonoured with an endorsement "funds insufficient" on 05.01.2011 vide return memo (Ex.P2); the complainant issued statutory demand notice dated 07.01.2011 (Ex.P3) to Nishad Mathew (A1) and Hotel Sea Gate (A2); the notice sent to Nishad Mathew (A1) was returned unserved, whereas, the notice that was sent to Hotel Sea Gate (A2) was served, as could be seen from the Acknowledgment Card (Ex.P4); since the accused did not comply with the demand, the complainant initiated a prosecution in S.T.C.No.296 of 2011, for the offence under Section 138 of the Negotiable Instruments Act, against the accused, before the Judicial Magistrate No.7, Coimbatore; on transfer of the said case to the Court of Judicial Magistrate, Fast Track Court at Magisterial Level No.II, Coimbatore, it was renumbered as C.C.No.67 of 2011.

4.The complainant examined himself as P.W.1 and marked Exs.P1 to P5. When the accused were questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against them, they merely denied the same and did not give explanation as to how the cheque issued by Nishad Mathew (A1) had gone into the hands of the complainant. The accused examined Jose John (D.W.1), Manager of Federal Bank, Thomas Parinchiappan (D.W.2), Manager of Axis Bank and Rajesh Nambiar (D.W.3), Manager of IDBI Bank, and marked Exs.D1 to D4. D.Ws.1 to 3 were examined by the accused to speak about the accounts maintained by Nishad Mathew (A1) in those Banks and the various cheque transactions in those accounts.

5. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 04.07.2012, in C.C.No.67 of 2011, convicted the accused of the offence under Section 138 of the Negotiable Instruments Act and sentenced Nishad Mathew (A1) to undergo simple imprisonment for one year and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for six months. The trial Court sentenced Hotel Sea Gate (A2) to pay fine of Rs.5,000/- in default Nishad Mathew (A1) to undergo simple imprisonment for six months.

6. The appeal in C.A.No.224 of 2012 that was filed by the accused was dismissed by the Additional District and Sessions Judge, Coimbatore, on 25.02.2013.

7. Aggrieved by the concurrent findings of the two Courts below, the accused have filed the present Criminal Revision Case before this Court under Section 397 r/w. 401 Cr.P.C.

8. Heard Mr.T.R.Ravi, learned counsel appearing for the petitioners/accused and Mr.Ramesh Kumar Chopra, learned counsel appearing for the respondents.

9. It is reported that, pursuant to the orders of this Court, the accused have deposited Rs.5,00,000/- before the trial Court.

10. It is trite 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. (2004) 7 SCC 659]. Very recently, in Bir Singh vs. Mukesh Kumar [(2019) 4 SCC 197], the Supreme Court has held as under:

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

11. Mr.T.R.Ravi submitted that it is the case of the accused that, Nishad Mathew (A1) had borrowed only Rs.10,00,000/- from the complainant and had issued 20 blank cheques, out of which, the complainant had filled up one cheque and has initiated the prosecution. It is the further defence of the accused that, Nishad Mathew (A1) had borrowed another sum of Rs.10,00,000/-

from the friends of the complainant and that he had returned Rs.20,00,000/- to the complainant and his friends.

12.In the cross-examination, the complainant has stated that he has disclosed the loan of Rs.30,00,000/- that was given to Nishad Mathew (A1), in his Income Tax Returns. DWs.1 to 3 have only proved the transactions that had occurred in the accounts maintained by Nishad Mathew (A1). There is no reference to the transaction(s) between the complainant and Nishad Mathew (A1) in the evidence of these three witnesses. According to Nishad Mathew (A1), he had borrowed only Rs.10,00,000/- from the complainant and he had repaid the amount. However, he has not produced any material to show that he had returned the said sum to the complainant.

13.In Uttam Ram Vs. Devinder Singh Hudan & Another (C.A.No.1545 of 2019 decided on 17.10.2019), the Supreme Court has held as follows :

''20.The Trial Court and the High Court proceeded as if, the appellant is to prove a debt before civil court wherein, the plaintiff is required to prove his claim on the basis of evidence to be laid in support of his claim for the recovery of the amount due. A dishonour of cheque carries a statutory presumption of consideration. The holder of cheque in due course is required to prove that the cheque was issued by the accused and that when the same presented, it was not honoured. Since there is a statutory presumption of consideration, the burden is on the accused to rebut the presumption that the cheque was issued not for any debt or other liability.

21.There is the mandate of presumption of consideration in terms of the provisions of the Act. The onus shifts to the accused on proof of issuance of cheque to rebut the presumption that the cheque was issued not for discharge of any debt or liability in terms of Section 138 of the Act ...''

Though the accused can discharge the burden under Section 139 of the Negotiable Instruments Act by preponderance of probability, as held by the Supreme Court in Rangappa Vs. Sri Mohan [2010 (4) CTC 118], the same has not been done in this case. In fine, this Court does not find any infirmity in the judgments of the Courts below, warranting interference.

14.In the result, this Criminal Revision Case is dismissed and the judgments of the two Courts below are confirmed. Consequently, connected miscellaneous petition is closed. The

trial Court is directed to secure Nishad Mathew (A1) and commit him to prison to undergo the sentence imposed on him.

15. Any amount that has been deposited by the accused either in the appellate Court or in the trial Court in connection with this case, shall be disbursed with accrued interest to the legal heirs of the complainant. It is always open to the parties to file an application before the trial Court under Section 147 of the Negotiable Instruments Act for compounding the offence, even after the accused is taken into custody. In the event of the matter being compounded under Section 147, *ibid.* before the trial Court, the Magistrate shall send a report to the Assistant Registrar (Crl. Side), who shall make it form part of the records in Crl. R.C. No.484 of 2013.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

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Copy to :

1. The Additional District and Sessions Judge,
Coimbatore.
2. The Judicial Magistrate,
Fast Track Court at Magisterial Level No.II,
Coimbatore.
3. The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records to the respective
High Court, Madras. | Courts below
4. The Assistant Registrar (Criminal side)
High Court, Madras 104.

+1 CC to Mr.S.V. Udhayakumar, Advocate sr 1157.

Crl. R.C. No.484 of 2013

PM(CO)
SP(13/02/2020)