



Bail Slip

Sundaraj, Petitioner/Accused S/o.Chellaian is released on bail vide Court order dated 10.09.2009 made in MP(MD)No.2 of 2009 in CRL RC (MD)No.439 of 2009.

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 21.02.2020

PRONOUNCED ON : 28.02.2020

CORAM

THE HONOURABLE MR.JUSTICE **M.NIRMAL KUMAR**

CRL.R.C. (MD) .No.439 of 2009

Sundaraj .. Petitioner/Accused

Vs.

Lukose .. Respondent /Complainant

PRAYER: Criminal Revision has been filed under Section 397 and 401 of Cr.P.C, against the judgment in C.A.No.236 of 2004, dated 13.10.2008 on the file of the District and Sessions Court, Kanyakumari at Nagercoil by modifying the sentence passed by the learned Judicial Magistrate No.I, Kuzhithurai in C.C.No.79 of 2001, dated 04.10.2004 and to set aside the judgment in C.A.No.236 of 2004, dated 13.10.2008 by modifying the sentence passed in C.C.No.79 of 2001, dated 04.10.2004.

For Petitioner : Mr.G.Karuppasamy Pandian,
for Mr.Deepak.

For Respondent : Mr.M.Ramesh,
Legal Aid Counsel

O R D E R

The Criminal Revision Petition has been filed seeking to set aside the judgment in C.A.No.236 of 2004, dated 13.10.2008 by modifying the sentence passed in C.C.No.79 of 2001, dated 04.10.2004.

2.The petitioner is the accused in a private complaint filed by the respondent/complainant for the offence punishable under Section 138 of Negotiable Instruments Act in C.C.No.79 of 2001, before the learned Judicial Magistrate No.I, Kuzhithurai.



3. The facts of the case are briefly stated hereunder:-

The case of the prosecution is that on 09.07.2000, the petitioner had borrowed a sum of Rs.2,00,000/- from the respondent to settle his family debt. In discharge of said liability, the petitioner had issued a cheque bearing No.231230, dated 09.12.2000, drawn on Tami Nadu Mercantile Bank, Verkizhampi Branch for a sum of Rs.2,00,000/-. Thereafter, the respondent presented the said cheque for collection through the State Bank of India, Chemmanvilai Branch and the same was dishonoured for the reason 'insufficient funds' and returned with a Memo, dated 02.01.2001.

4.The respondent informed this issue to the petitioner, therefore, the petitioner requested the respondent to present the said cheque after 45 days. Thereafter, the respondent again presented the said cheque for collection on 25.02.2001 in the State Bank of India, Chemmanvilai Branch and the same was again returned for the reason 'insufficient funds' along with memo, dated 02.03.2001. Therefore, the respondent had issued a statutory notice on 12.03.2001 and the same was received by the petitioner on 20.03.2001. On 23.03.2001, the petitioner has given a reply notice with false averments against the respondent. Therefore, the respondent filed a complaint under Section 138 of Negotiable Instruments Act against the petitioner.

5.The trial Court examined the witnesses P.W.1 to P.W.3 and eight documents were marked (Ex.P.1 to Ex.P.8). On the side of the respondent two witness were examined as D.W.1 to D.W.2 and one document was marked as Ex.D.1.

6.On conclusion of trial, the trial Court had found that the petitioner was guilty and sentenced him to under go one year Rigorous Imprisonment and to pay a fine of Rs.4,000/- in default to under go one month Simple Imprisonment. Aggrieved against the same, the petitioner had preferred an appeal in C.A.No.236 of 2004, before the Sessions Court, Kanyakumari Division, Nagercoil.

7.The lower appellate Court by judgment, dated 13.10.2008 partly allowed the appeal by modifying the sentence imposed by the trial Court and directing the petitioner to deposit a sum of Rs.2,00,000/- less the fine amount already paid in the trial Court within three months, in default, the petitioner shall undergo one year Rigorous Imprisonment. As against the same, the present revision has been filed.



8.The contention of the learned counsel for the petitioner is that the respondent is a Driver in the State Transport Corporation and he is drawing meagre salary of Rs.7,500/- and he had no means to lend a sum of Rs.2,00,000/- as loan. Even by April 2000, the respondent got loan for a sum of Rs.47,000/- from his office. In such position, he cannot lend such huge amount of Rs.2,00,000/- as loan. Further, the respondent had admitted that in his bank account, he has not deposited more than Rs.30,000/- at any point of time. The respondent has got no financial capacity and it is highly improbable that the petitioner has got loan for a sum of Rs.2,00,000/- from the respondent.

9.The learned counsel for the petitioner further submitted that it is the fact that except the signature found in Ex.P.1/cheque, the date, month, year and the other entries were not written by the petitioner and they are with different ink, therefore, the body of Ex.P.1/cheque was not filled by the petitioner.

10.In support of his contention, the learned counsel for the petitioner relied upon the judgment of this Court in **H.Ubaidulla Vs. S.Elango** reported in **2019 (1) MWN (Cr.)DCC 159 (Mad.)** The relevant portion of the order is extracted here under:

22.Once there presumption is rebutted, it is the Respondent/Complainant to prove that the Cheque was issued towards enforceable liability. As already pointed out, the Respondent/Complainant has not produced any reliable evidence to show that he lent Rs.5 lakhs to the accused. His mere oral evidence is not sufficient to hold that he lent money to the Petitioner/Accused.

He has also relied upon the judgment of the Honourable Supreme Court in the case of **Basalingappa Vs.Mudibasappa** reported in **2019 (1) MWN (Cr.) DCC 145 (SC)**. The relevant paragraph is extracted hereunder:

28.We are of the view that when evidence was led before the Court to indicate that apart from Loan of Rs.6 lakhs given to the accused, within 02 years, amount of Rs.18 lakhs have been given out by the Complainant and his financial capacity being questioned, it was incumbent on the Complainant to have explained his financial capacity. Court cannot insist on a person to lead negative evidence. The



observation of the High Court that Trial Court's finding that the Complainant failed to prove his financial capacity of lending money is perverse cannot be supported. We fail to see that how the Trial Court's findings can be termed as perverse by the High Court when it was based on consideration of the evidence, which was led on behalf of the defence. This Court had occasion to consider the expression "perverse" in Gamini Bala Koteswara Rao and others Vs. State of Andhra Pradesh, through Secretary, 2009(10) SCC 636, this Court held that although High Court can reappraise the evidence and conclusions drawn by the Trial Court but Judgment of Acquittal can be interfered with only [when] Judgment is against the weight of evidence. In paragraph No.14 following has been held:

"14.We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr.Rao, that interference in an Appeal against an acquittal recorded by the Trial Court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the Trial Court but only in a case, when the Judgment of the Trial Court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the Judgment of the Trial Court which has been found perverse by the High Court was in fact so."

29. High Court without discarding the evidence, which was led by defence could not have held that finding of Trial Court regarding Financial capacity of the Complainant is perverse. We are, thus, satisfied that Accused has raised a probable defence and the findings of the Trial Court that Complainant failed to prove his Financial capacity are based on evidence led by the defence. The observations of the High Court that findings of the Trial Court are perverse are unsustainable. We, thus, are of the



view that Judgment of the High Court is unsustainable.

11. According to the petitioner, the specific case of the respondent is that it is a loan transaction and the petitioner had sought loan from the respondent. Once it is proved that it is a loan transaction without any other materials, in support of the loan transaction presumption under Section 139 of Negotiable Instruments Act could not be automatically applied in view of the dispute of the loan and other particulars.

12. The learned counsel for the petitioner further submitted that the respondent/complainant admits that he is not a licensed money lender and how he knew the petitioner. The respondent is not sure and certain about the petitioner's avocation, his residence and about his family. But, he states that he had extended a loan of a huge sum of Rs.2,00,000/-, which is unbelievable. Further, the respondent has not given any details with regard to his finance capabilities to extend such huge loan. It has been specifically stated that the petitioner had issued a cheque in favour of one Jebamonydhas @ Eronimas. Further, the petitioner had sent a reply notice/ Ex.P.5, it is clearly stated that the respondent is a total stranger.

13. Further, the respondent had examined one Christopher Sam Miller /D.W.1, who is the previous manager of the Blue Metal Crusher. He had clearly stated about the business transaction between the petitioner and one Jebamonydhas @ Eronimas. During the business transaction, the petitioner had given three signed blank cheques to the said Jebamonydhas @ Eronimas. Later, their business relationship strained and Ex.P.1 is one of the cheque handed over to the said Jebamonydhas @ Eronimas, with regard to the another cheque, the said Jebamonydhas @ Eronimas has filed a suit in O.S.173 of 2000 before the Subordinate Judge, Thucklai. The petitioner has examined himself as D.W.2 and deposed about the business transaction with the said Jebamonydhas @ Eronimas. Later, the settlement of their dues between them, the said Jebamonydhas @ Eronimas, was in possession of the blank cheque leaf and the same is used to file a suit as well as initiating the proceedings under Section 138 Negotiable Instruments Act.

14. The respondent/complainant is one such person, who have been used by Jebamonydhas @ Eronimas. The respondent during the cross examination of the petitioner/D.W.2 had highlighted the various proceedings of the petitioner and his wife, but, had not questioned or suggested to the petitioner about the loan



transaction. He had not put any question or suggestion with regard to the loan between the respondent and the petitioner. He had not questioned or suggested with regard to the loan between them and failed to substantiate his claim.

15. On the other hand, the petitioner had questioned the financial capabilities of the respondent. Further, submitted that both the trial and the lower appellate Court had gone on a wrong premises stating that whatever has been raised by the petitioner in the cross examination had not been stated in the reply notice / Ex.P.5. Hence, the evidence brought in were not considered and not appreciated. It is not in proper perspective.

16. Failing to look into the fact that the petitioner himself has got into the box to dispel and dislodge the initial presumption. Thereafter, the respondent had failed to prove the case beyond reasonable doubt.

17. The learned counsel for the respondent submitted that the signature in cheque/Ex.P.1 is not disputed. Further, no explanation has been given by the petitioner, how the cheque came in possession of the respondent. Once the signature is not disputed, the presumption of Section 139 Negotiable Instruments Act follows. The reasons given by the petitioner are not acceptable. The petitioner has been taking different stand at each stage, once during reply notice another during trial, which would only expose the hollowness in the defence of the petitioner. Both the Courts below, on consideration of the evidence had rightly convicted the petitioner, which need not be interfered with and prayed for dismissal of the revision.

18. Considering the rival submissions and on perusal of the materials, it is seen that P.W.1 is employed as Driver in Tamil Nadu Transport Corporation and admittedly his salary is only Rs.7,500/- per month. He also admits that in his account at any point of time no more than Rs.30,000/- had been deposited. He also admits that he is not aware of the avocation, family background and status of the petitioner. The respondent further admitted that it was a loan to the petitioner it cannot be conceived, how money lending business in a loan transaction without obtaining any business documents or any proof such loan could be given.

19. The respondent had not substantiated his case with any supporting material with regard to the loan. Further, on specific denial of the petitioner that the respondent is a total stranger and the writings differ, the bank witness admitting that the writings in the cheque and the signature, ink character there is variations.



20.The findings of both lower Court as well as the lower appellate Court is that the defence put forth by petitioner by way of cross examination, during trial which are not mentioned in the reply notice is not a ground, to reject the evidence of witnesses. The petitioner has brought on record that the respondent has got no financial capacity to extent such a huge amount of Rs.2,00,000/-. He had not maintained any records, given proper explanation. The explanation of the petitioner is that one of the cheques handed over to Jebamonydhas @ Eronimas used in this case against the petitioner seems portable.

21.The explanations given by the petitioner is plausible and probable. Further, in the absence of respondent proving his financial capabilities and by not producing any supporting documents. This Court is of the view that the respondent has not proved the case beyond reasonable doubt against the petitioner.

22.Before parting with the case, this Court places on record its appreciation for the sincere effort made by the Legal Aid Counsel Mr.M.Ramesh, who has appeared for the respondents. This Court directs the Legal Service Committee attached to this Bench to pay his remuneration.

23. In the result, this Criminal Revision is allowed and the judgments of the Court below rendered in C.A.No.236 of 2004, dated 13.10.2008 and C.C.No.79 of 2001, dated 04.10.2004 are set aside. The petitioner is acquitted from all charges.

Sd/-

Assistant Registrar (Records)

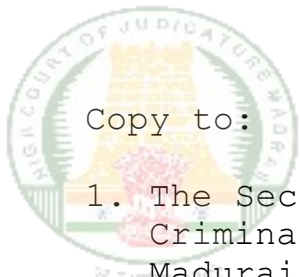
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/ /2020

Sub Assistant Registrar(CS)

To

1. The Judicial Magistrate No.1, Kuzhithurai.
- 2.The Judicial Magistrate No.II, Nagercoil.
3. The Sessions Judge, Kanyakumari Division, Nagercoil.



Copy to:

1. The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

2. The Administrative Assistant,
High Court Legal Services Committee,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.F.DEEPAK, Advocate (SR-9175[F] dated 28/02/2020)

+1 CC to M/s.M.RAMESH, Advocate (SR-9256[F] dated 28/02/2020)

CRL.R.C. (MD) .No.439 of 2009
28.02.2020

AE/ 16.03.2020/ 8P/9C