Bail slip

M.Syed Mohamed, S/o. Mohamed Mohideen, Male, aged about 60 years was released on bail vide court order dated 26.11.2014 made in MP(MD)No.1 of 2014 in CRL A(MD)NO.309 of 2014.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 02.12.2020
Pronounced on : 05.12.2020
CORAM :
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
Crl.A.(MD)No.309 of 2014
and
Crl.M.P.(MD)No.6036 of 2020

M.Syed Mohamed ... Appellant

Vs.

The State rep. by the
Inspector of Police,
Police Station (Prevention of Corruption),
Nagercoil, Kanyakumari District.
(Crime No.7 of 2005) ... Respondent

Prayer : Criminal Appeals filed under Section 374(2) of the Civil Procedure Code, to call for the records relating to the Judgment 31.10.2014 made in S.C.No.4 of 2010 on the file of the Special Judge cum Chief Judicial Magistrate Court, Nagercoil and set aside the conviction and sentence imposed against the appellant/accused and allow the above appeal by acquitting the accused.

For Appellant : Mr.Ajmalkhan Senior Counsel
for M/s.Ajmal Associates

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

JUDGMENT

This appeal has been preferred against the Judgment dated 31.10.2014 passed by the learned Special Judge cum Chief Judicial Magistrate, Nagercoil in Special Case No.4 of 2020. By the impugned Judgment, the appellant had been found guilty of the offence under Section 13(2) r/w Section 13(1)(e) of the Prevention of Corruption Act, 1988 and sentenced to two years rigorous imprisonment and also levied with fine of Rs.20,000/-. Default sentence was also imposed.

2.The appellant was working as Superintendent of Kanyakumari Market Committee. The check period is 01.01.1999 to 20.06.2002. The assets that stood to his credit on the date of commencement of the check period was Rs.1,39,131/-. According to the prosecution, the assets owned by him in his name and in the name of his family members at the end of the check period was Rs.11,84,325/-. The income of the appellant during this period was Rs.5,06,144/-. It was estimated that he ought to have incurred an expenditure of Rs.4,55,323/-. Therefore, his likely savings could have been Rs.50,820/-. Therefore, as per Statement No.VII, the value of the assets acquired during this period disproportionate to the known sources of income was assessed at Rs.9,94,373.50/-. This was said to be 196.5% in excess of the appellant's known sources of income. Based on the source income, Crime No.7 of 2005 was registered on the file of the Inspector of Police, Vigilance and Anti Corruption, Nagercoil on 17.09.2005 (Ex.P37). Investigation was conducted and the statement of the accused was also obtained. Since the explanation furnished by the accused was not found to be convincing, final report came to be filed before the Jurisdictional Court. Cognizance was taken and summons were issued to the appellant. On his appearance, copies were served. Charges were framed for having committed the offences under Sections 13(2) r/w 13(1)(e) of the Prevention of Corruption Act. The appellant denied the charges and claimed to be tried. The prosecution examined P.W.1 to P.W.24 and marked Ex.P1 to Ex.P.43. The accused examined himself as D.W.2. His brother-in-law Sheik Abdul Khader was examined as D.W.1. On the side of the accused, Exs.D1 to D5 were marked. The learned trial Judge put all the incriminating circumstances against the accused during his examination under Section 313 of Cr.P.C., The accused denied the same as false. After considering the entire evidence on record, the learned trial Judge found the accused guilty of the offence, with which he was charged and sentenced him as mentioned above. Questioning the same, this appeal came to be filed.

3.The learned Senior Counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and in the written arguments and wanted this Court to set aside the impugned Judgment and acquit the appellant and allow this appeal.

4.Per contra, the learned Government Advocate (Crl.side) submitted that the impugned Judgement does not call for any interference and sought dismissal of the appeal.

5.I carefully considered the rival contentions and went through the entire evidence on record.

6.The appellant joined service as Junior Assistant in the Agricultural Marketing Committee in the year 1975. He became Supervisor in the year 1981. The learned Senior Counsel submitted that considering the unblemished service put in by him, the appellant was also awarded by the Department. The provocation for registering Ex.P31-FIR was the construction of a new house after demolishing the existing building that stood on the family property of the appellant. The learned Senior Counsel faulted the prosecution for having chosen the check period as between 01.01.1999 and 20.06.2002 without taking note of the length of service. According to him, the cost of construction of the house was Rs.8,00,000 and not Rs.8,95,451/- as valued by the prosecution. The learned Senior Counsel submitted that the Court below failed to properly consider the testimony of D.W.1 and D.W.2 and the documents marked through them. D.W.1 is none other than the brother-in-law of the accused. Admittedly, he was employed in Saudi Arabia. It is seen from Ex.D4 that D.W.1 had withdrawn a sum of Rs.5,00,000/- in October 1998. This amount was given to the accused by D.W.1 for funding the construction of the house. The accused had also withdrawn a sum of Rs.2,72,000/- from his provident fund. The Judgment of the Court below was also faulted for not taking note of the stand of the defence. The fixed deposit amount found in the name of the accused and his family members in Appu Finance actually belonged to D.W.1 and not to the accused. He also submitted that the sanction order issued by the competent authority suffered from patent non application of mind. He also seriously challenged Ex.P10 and Ex.P11 valuation reports. According to the learned Senior Counsel, the accused and his family were living in his father-in-law's house and that the father-in-law took care of the family expenditure. Therefore, the accused was able to save his entire salary. He also pointed out that the wife of the accused was having agricultural land and that she was also earning about Rs.3,000/- per annum. The learned Senior Counsel pointed out that the learned trial Judge had mechanically accepted the case projected by the prosecution and erroneously found the accused guilty of the offence, with which, he was charged.

7.I am not persuaded by the submissions of the learned Senior Counsel. Though as many as 24 witnesses have been examined and 43 documents were marked on the side of the prosecution, the core issue is rather simple. Though the accused joined in the Agricultural Marketing Committee as Junior Assistant in 1975 and became Supervisor in the year 1981, even during the check period, his monthly salary was less than Rs.10,000/-. In fact, the learned Senior Counsel did not dispute that the assets that stood to the credit of the accused on the date of commencement of the check period ie., 01.01.1999 was only Rs.1,39,131/-. He had a savings bank account in the State Bank of Travancore and that reflected cash balance of Rs.1,05,261/-. The argument that the accused and his family comprising his wife and two children, were living in his father-in-law's house and that, father-in-law took care of his entire household expenditure, appear to have been made as an after thought. When a specific question was put to D.W.1 (brother-in-law of the accused) as to whether the accused was treated as son-in-law of the house ('Veetu Mappillai' a term used to describe such a son-in-law in Tamil Language), the reply was in the negative. In any event, there is absolutely no material to show that whatever earned by the accused was carefully saved by him is not borne out by the records. Therefore, this Court has to proceed on the basis that the value of the assets owned by the accused as on 01.01.1999 was only Rs.1,39,131/-. I must record that this valuation was not challenged by the learned Senior Counsel appearing for the appellant.

8.The primary argument of the learned Senior Counsel appearing for the accused was that the construction of the house was funded by the loan of Rs.5,00,000/- provided by D.W.1 (bother-in-law of the accused). It is true that from the entry found in Ex.D4, it is seen that a sum of Rs.5,00,000/- was withdrawn by D.W.1 Sheik Abdul Khadar. But as rightly pointed out by the learned Government Advocate, there is nothing on record to show that this amount was actually handed over to the accused. Rs.5,00,000/- was certainly a taxable amount in the year 1998 and there is nothing on record to show that this transaction was reflected in the income tax returns of D.W.1. There was no transfer of funds from the account of D.W.1 to that of D.W.2. It is claimed that it was handed over in cash by D.W.1 to D.W.2. There are no contemporaneous documents evidencing the said transaction. More than anything else, neither previous permission of the Department was obtained nor subsequently intimated.

9.As rightly contended by the learned Government Advocate (Crl.side), the offence is committed, if a public servant cannot satisfactorily account for the pecuniary resources and the property possessed by him and if they are disproportionate to his known sources of income. The expression "Known sources of income" has been explained in the statute itself as income received from any lawful source and such receipt has been intimated in accordance with the provisions of any Law, Rules or Orders for the time being applicable to the public servant. Rule 6(4)(aa) of the Tamil Nadu Government Servants Conduct Rules states that no Government servants shall either himself or through any member of his family or any other person working on his behalf, except with the previous sanction of the Government, lend or borrow money to or from any private individual, any amount exceeding Rs.10,000/-. According to the accused, D.W.1 gave him a sum of Rs.5,00,000/-. Admittedly, this was not brought on record. The Hon'ble Supreme Court in the decision reported in ***(2015) 14 SCC 505 Kedarilal Vs. State of Madhya Pradesh*** held as follows:-

> *"10.The expression "Known sources of income" in Section 13(1)(e) of the Act has two elements, first, the income must be received from a lawful source and secondly, the receipt of such income must have been intimated in accordance with the provisions of law, rules or orders for the time being applicable to the public servant. In N.Ramakrishnaiah, while dealing with the said expression, it was observed: (SCC pp.86-87 para 17).*
>
> *"17. '6.... Qua the public servant, whatever return he gets from his service, will be the primary item of his income.*

[other income which can conceivably be] income qua the public servant, will be in the regular receipt from (a) his property or (b) his investment.'

The Categories so enumerated are illustrative. Receipt by way of share in the partition of ancestral property or bequest under a will or advances from close relations would come within the expression "Known sources of income" provided the second condition stands fulfilled that is to say, such receipts were duly intimated to the authorities as prescribed.

11.We have gone through Rules 14, 17 and 19 of the Rules. Rule 14 lays down that a government servant on occasions such as weddings, anniversaries or religious functions may accept gifts up to a certain limit, if he makes a report of such fact to the Government within a period of one month. Sub-rules (4) and (5) provide, inter alia, that in any other case, the Government servant shall not accept any gift without the sanction of the payee cheque. Rule 17 deals with investment, lending and borrowing and provides inter alia that government servant may give to, or accept from a relation or a personal friend, a purely temporary loan. Rule 19 lays down that the government servant must intimate the details of property inherited or acquired by the government servant. There is no absolute embargo or prohibition in the Rules and all that is required is sanction or permission from the Government."

10.In the said case, the accused was acquitted because the transactions were duly intimated to the Government and also reflected in the income tax returns filed by him. But such is not the case here.

11.The learned Government Advocate (Crl.side) would also contend that merely because, a sum of Rs.5,00,000/- was shown as having been withdrawn by D.W.1 from his bank account, that by itself would not be sufficient. It was necessary for the defence to have established that the amount of Rs.5,00,000/- represents the income of D.W.1 from his lawful and known sources. Mere claim that D.W.1 was employed in the middle east in a well known company would not by itself be determinative of the issue. The Hon'ble Supreme Court in the decision reported in ***(2017) 6 SCC 263, State of Karnataka Vs. J.Jayalalitha***, held as follows:-

".... 195. In State of Tamil Nadu Vs. N.Suresh Rajan, the allegation against the respondent, who was the Minster of Tamil Nadu was acquisition of pecuniary resources and properties in his name and in the name of his family members, and friends, disproportionate to the known sources of income. Charge of abetment was also levelled against the family members and friends. Charge sheet was submitted under Section 109 IPC read with Sections 13(1)(e) and 13(2) of the 1988 Act.

All of them were discharged by the High Court.

196. This Court ruled that the fact that the accused, other than the two ministers, had been assessed to income tax and had paid income tax could not have been relied upon to discharge the accused persons in view of the allegation made by the prosecution that there was no separate income to amass such huge property. It was underlined that the property in the name of the income tax assessee itself cannot be a ground to hold that it actually belongs to such an assessee and that if this proposition was accepted, it would lead to disastrous consequences. This Court reflected that in such an eventuality it will give opportunities to the corrupt public servant to amass property in the name of known person, pay income tax on their behalf and then be out from the mischief of law...."

12.This burden cannot be shifted to the prosecution. It is the defence of the accused and it was for the accused to have discharged the burden. Of-course, the standard of proof will be preponderance of probability. This was a fact that it was within the knowledge of D.W.1 and it was for him to have established the same. I must hold that the accused had failed to discharge this burden that a sum of Rs.5,00,000/- withdrawn by D.W.1 actually represented his own wealth. In any event, if it was shown that the said amount of Rs.5,00,000/- actually belongs to D.W.1, still in view of the failure on the part of D.W.2/accused to have got prior permission from the Department for borrowing the said amount, the same cannot be taken into account. I had already held that there is absolutely no material to come to the conclusion that the loan transaction had actually taken place. The accused did not even subsequently intimate the Department about the same. Therefore, the Court below rightly came to the conclusion that this was an after thought and D.W.1 being the brother-in-law of the accused is a obliging witness.

13.There is one other aspect of the matter. It is seen from Ex.P23 and Ex.P.24 that the approval for the construction was obtained only in January 2000. Withdrawal by D.W.1 had taken place in October 1998 itself. Interestingly, the accused, while applying to the local body for building plan permission, had mentioned that the cost of construction would be Rs.1,03,000/-.

14.Looked at from any angle, I have to sustain the finding of the Court below that the claim of the accused that a sum of Rs.5,00,000/- was given by D.W.1 towards cost of construction was not believable.

15.The learned Senior Counsel pointed out that the accused had withdrawn a sum of Rs.2,72,000/- from the provident fund account and that this was not taken into account. Even according to the accused, a sum of Rs.1,50,000/- was withdrawn on 20.09.2001, a sum of Rs.89,000/- was withdrawn on 03.10.2003 and further a sum of Rs.68,000/- was withdrawn on 06.10.2004. The prosecution had shown that the house warming ceremony was performed in January 2001 itself. Thus, two of the withdrawals from the provident fund account had taken place only subsequently. In any event, the two withdrawals took place after the check period and therefore, they were rightly not taken note of. More than anything else, the accused had withdrawn the said sums towards the medical treatment of his wife. Therefore, it is not open to the accused to now claim that they were instead utilized towards house construction.

16.The learned Senior Counsel devoted a substantial portion of his arguments to attack the valuation arrived at by the prosecution. He would point out that Ex.P10 and Ex.P11 do not contain the original documents and that they were not admissible in law.

17.This Court drew the attention of the learned Senior Counsel to the relevant testimony of P.W.24-Investigation Officer that in the carbon copies, the original signatures were very much found. Even if the valuation of the prosecution is rejected, according to the accused, the cost of construction was Rs.8,00,000/-. According to the prosecution, it was Rs.8,95,000/-. Thus, there is not much of difference between the two. I am prepared to go by the valuation given by the accused himself. Even then, the accused could not explain the cost of construction fell within the known sources of income.

18.The Net Pay drawn by the accused during the check period was Rs.4,78,260/-. The agricultural income received from the land that stood in the name of his wife was Rs.19,550/-. They had received a sum of Rs.8,334/- as interest on recurring deposit made in the post office. If that three were added, it would come to Rs.5,06,144/-. The expenditure during the relevant period as assessed by the prosecution was Rs.4,55,323/-. But the accused would claim that the expenditure, during this period, incurred by him was only Rs.2,42,525/- . This substantial difference has arisen because a sum of Rs.1,50,000/- withdrawn by him from the provident fund account towards medical expenditure was taken as having been spent for the said purpose by the prosecution. But the accused would claim that a false reason was assigned and that the said amount was actually spent towards construction.

19.The learned Senior Counsel filed a calculation statement and it is seen from the said calculation statement that according to the accused, income of the accused during the check period was Rs.12,46,967/- According to him, his expenditure during the said period was Rs.2,42,525/-. Therefore, likely savings of the accused during this period was Rs.10,04,442/-. The value of the assets acquired during this period, according to the prosecution, is Rs.10,45,194/-. According to the accused, the value is

Rs.9,49,743/-. Thus, the value of the assets was less by 4.62%. Therefore, according to the learned Senior Counsel, no offence has been made out.

20.It is not in dispute that the prosecution has brought on record through Ex.P12, Ex.P13, Ex.P14, Ex.P15 and Ex.P16 that the accused was having a sum of Rs.2,00,000 in his name and that of the other members of his family in Appu Finance. The said documents were marked through P.W.7 Rengasamy, Inspector of Police, EOW and P.W.8-Leela wife of the Proprietor of the Finance was also examined. Though the accused would claim that the deposit amounts belonged to his brother-in-law D.W.1 and that they do not belong to him, when D.W.1, was specifically cross examined in this regard, he admitted that it was the accused who had made the deposits. As remarked by the learned Government Advocate, D.W.1 got married in 1983 and he is having his own family. Therefore, it is not believable that he had deposits in Appu Finance in the name of the accused and his family members. In any event, in view of the testimony of the aforesaid two witnesses namely Rengasamy and Leela and the unimpeachable documentary evidence, the Court below rightly came to the conclusion that the said amounts actually belong to that of the accused. Therefore, the prosecution was right in taking the same into account.

21.The assets that stood in the name of the accused as on 01.01.1999 was Rs.1,39,131/-. The assets that stood to the credit of the accused at the end of the check period ie., 20.06.2002 was Rs.11,84,325/-. The income of the accused, during the check period, was Rs.5,06,144/-. Even after I take into account the provident fund withdrawal, the income would be Rs.6,56,144/-. The consumption expenditure of the accused for the year 1999 was quantified at Rs.26,045 by the prosecution. To me, this figure by applying the standard formula and Government indexes cannot be said to be incorrect. But the accused would claim that during this period, he incurred only a sum of Rs.17,364/-. Though I uphold the calculation made by the prosecution as regards the expenditure incurred by the accused, during this period, even if I go by the statement of the accused that he incurred only a sum of Rs.2,42,252/- during this period, still that would not come to rescue the appellant.

22.This is for more than one reason. The accused has not been able to establish that the sum of Rs.5,00,000/- which he claims to have obtained from his brother-in-law (D.W.1) as hand loan represents the known sources of income. Likewise, even for construction of the house, permission has not been obtained. The accused would claim that he received a sum or Rs.80,000/- as a gift during the house warming ceremony. The same was also not intimated to the Department. The said amount of Rs.80,000/- cannot also be taken into account. The accused would claim that he has nothing to do with the amount of Rs.2,00,000/- found as deposited in the name of the accused and that of his family members in Appu Finance. The said stand has been rejected by me. Thus, even going by the calculation given by the accused, I have to come to the conclusion that there is still a big discrepancy. As already pointed out, the calculation arrived at by this Court would run thus:-

CALCULATION STATEMENT

Statement No.I (At the beginning of the check period)	As per prosecution Rs.1,39,131.40
Statement No.II (Overall assets stood to the credit of the accused end of the check period ie, 20.06.2002)	As per prosecution Rs.11,84,325.40
Statement No.III (Income of the accused during check period)	As per prosecution Rs.5,06,144.00 (Adding a sum of Rs.1,50,000/- which was withdrawn by the accused from his Provident Fund) Total income is Rs.6,56,144.00
Statement No.IV (Expenditure of the accused during the check period)	As per prosecution Rs.4,55,323.50 (-) Deducting the medical expenditure of a sum Rs.1,50,000/- Total - Rs.3,05,323.50
Statement No.V (Statement No.II - Statement No.I = V)	Rs.11,84,325.40 - Rs.1,39,131.40 --------------------- Rs.10,45,194.00 ---------------------
Statement No.VI (Statement No.III - Statement No.IV = VI)	Rs.6,56,144.00 (including PF amount of Rs.1,50,000) Rs.3,05,323.50 -------------------- Rs.3,50,821.00 -------------------
Statement No.VII (Statement No.V - Statement No.VI = VII)	Rs.10,45,194.00 (-) Rs.3,50,821.00 --------------------- Rs.6,94,373.00 ---------------------

Percentage of disproportionate assets (Statement No.VII (x) 100/Statement No.III)	105.82% Rounded off to 106%

But the disproportionate assets acquired by the accused is Rs.6,94,373.00. This comes to 106%. Only if the disproportionate assets are within 10%, then, applying the ratio laid down in ***Krishnanad Agnihotri Vs. The State of Madhya Pradesh (1997) 1 SCC 816,*** the accused can be given a benefit of doubt. But the value of the disproportionate assets is 106%.

23.Therefore, I have to necessarily hold that the Court below was justified in rendering a finding of guilt. The conviction and fine imposed on the appellant under Section 13(2) r/w. 13(1)(e) of the Prevention of Corruption Act, 1988 is confirmed. However, taking note of the lapse of time and other aspects pleaded by the learned Senior Counsel, the sentence of imprisonment is reduced from two years to one year rigorous imprisonment. The period of incarceration already undergone by the appellant shall be set off in terms of Section 428 of Cr.P.C. The Criminal Appeal is partly allowed. The Court below shall take steps to enforce this judgment. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CO)

// True Copy //

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Sub Assistant Registrar(CS)

skm

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Special Judge cum Chief Judicial Magistrate Court, Nagercoil.

2.The Inspector of Police,
Police Station (Prevention of Corruption),
Nagercoil, Kanyakumari District.

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

COPY TO

1.Mr.A.Robinson
Government Advocate (Crl.side)
Madurai Bench of Madras High Court, Madurai.

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

+1 CC to M/s.AJMAL ASSOCIATES, Advocate (SR-23944[F] dated 04/12/2020)

Crl.A.(MD)No.309 of 2014
05.12.2020

SS(CO)
TR(10.12.2020) 11P 8C