IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.07.2022

Pronounced on :03.08.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Criminal Appeal No.464 of 2016

1.Kimis(now deceased)

2.Jayaseeli Mathurabai Asir Packianathan

3.Arasnath Kimis

4.Sasibai Kimis

5.Kijaynath Kimis

6.Jakibai Kimis

7.Poombai Kimis
(As per order in Crl.M.P.No.7018/2019
in Crl.A.No.464 of 2016 dated 10.06.2019) .. Appellants

/versus/

1.Ram Raj

2.Jansipappa

3.State by Inspector of Police,
Central Crime Branch,
Vepery, Chennai 600 007,
Crime No.51/2010. .. Respondents

Prayer: Criminal Appeal has been filed under Section 372 (2)of Cr.P.C., to set aside the order of acquittal made in C.A.No.158/2015 on the file of the XVII Additional Judge, City Civil Court, Chennai and restore the conviction in C.C.No.3933/2011 on the file of the XI Metropolitan Magistrate Court in the interest of justice.

For Appellants :Mr.V.K.Sathiamurthy

For Respondents :Mr.R.Thiagarajan for R1 and R2

Mr.R.Kishore Kumar for R3

JUDGMENT

This Criminal Appeal is against the order of acquittal rendered by the lower Appellate Court reversing the judgment of conviction and sentence passed by the trial Court.

2. The appeal is by the defacto complainant, who initiated the criminal prosecution through his written complaint dated 20/01/2010 addressed to the Commissioner of Police, Egmore, Chennai alleging that, he is a resident of Malayasia. He started a company in India by name "Phonenix Technology Corporation Limited" having its registered office at Bangalore. He appointed his relative D.Kamaraj as a Director of the Company to be in-charge of the operation at Bangalore. Later, a Branch

Office of the Company was started at Chennai to carry out the work for Southern Railways. D.Ramaraj, the brother of D.Kamaraj was appointed as Manager to look after the affairs of the Chennai Branch. The company could not make out any profit out of the contracts. Hence, operation at Bangalore office was closed in the year 2003 and D.Kamaraj was asked to take care of Chennai office along with his brother Ramaraj. To complete the contract works already undertaken at Chennai, he also infused fund of Rs.70 lakhs. However, the business did not improve. Then, Ramaraj promised to revive the company from its loses and sought salary of Rs.40,000/- p.m to carry out the liaison work on behalf of the Malaysian company. The house at No.41-B, Pasumarthy Street, Kodambakkam, Chennai was rented for the Chennai Branch and for stay of D.Ramaraj and D.Kamaraj. A room in it was reserved for the stay of the complainant, whenever he visit Chennai. In the year 2007, Ramaraj informed him that the landlord of the said premises Mrs.Malathy wants to sell the house and prompted him to buy it. He decided to buy the property and completed the deal for Rs.98 lakhs through Ramaraj. He gave Malaysian Ringgits equivalent to INR 34,00,000/- (Rupees Thirty Four lakhs) to Ramaraj, when he visited Malaysia during the month of

March, 2007 as advance for the deal and the balance of Rs.64 lakhs paid through Bank Transfer in favour of Mrs.V.Malathy. Meanwhile, Jansipappa, the wife of Ramaraj sought financial help from him to redeem her mortgaged jewels and for that purpose, he gave Rs.9,50,000/- to Jansipappa in the month of September 2009.

3.Later, when he verified the documents, he came to know that the Ramaraj using the money given for purchase of the property in the name of the company acting as power agent of Vijayaragavan (the actual owner of the property), transferred the property in favour of his wife Jansipappa on 31/12/2009. Therefore, he questioned Ramaraj about his act of deceit. For which he sent a notice alleging the complainant owe him Rs .5 lakhs as reward for his service. On verification of the Company's Chennai Branch accounts, he found that instead of receivable of Rs.70 lakhs, Ramaraj has falsified the accounts as if the receivable is only Rs.10 lakhs and had misappropriated the balance amount of Rs.60 lakhs. Hence, the complaint of cheating and misappropriation to a tune of Rs.1.6 crores by (i) Ramaraj, (ii) Jansipappa and (iii) V.Malathy.

4.This complaint was taken up for investigation by the Central Crime Branch in Crime No: 51 of 2010. On completion of investigation, final report filed against Ramaraj and his wife Jansipappa. The Court took the final report on file in C.C.No.3933/2011. Charges framed under Sections 408 and 420 r/w 34 IPC against first accused and under Sections 406 r/w 109 IPC and 420 r/w 34 IPC against the second accused. To prove the charges, the prosecution examined 11 witnesses and marked 21 Exhibits. The first accused Ramaraj mounted the box and got examined as DW-1. Ex.D-1 to Ex.D- 8 marked on the side of the accused. .

5.The trial Court found both A-1 and A-2 guilty. Convicted and Sentenced them to undergo punishment as below :

A-1–Ramaraj	(i)offence under Section 408 IPC. (ii)offence under Section 420 r/w 34 IPC.	(i)To undergo 3 years RI and to pay a fine Rs.5000/- . In default to undergo 6 months SI. (ii)To undergo 3 years RI and to pay a fine of Rs.5000/-. In default to undergo 6 months SI.
A-2-Jansipappa.	(i)offence under Section 406 r/w 109 IPC. (ii)offence under Section 420 r/w 34 IPC.	(i)To undergo 1 year SI. (ii)to undergo 3 years RI and to pay a fine of Rs.5000/-. In default to undergo 6 months SI.

The period of substantive sentence ordered to run concurrently.

6.The accused persons preferred appeal against the above conviction and sentence. The XVII Additional Judge, City Civil Court, Chennai reversed the judgment of conviction and sentence rendered by the trial Court. The trial Court judgment was set aside and the appeal was allowed. The aggrieved defacto complainant is before this Court challenging the judgment of the lower appellate Court.

7.The learned counsel for the appellant/defacto complainant referring the documents and the testimony of PW-1/the defacto complainant, PW-2 (Mr.Prasad), PW-3 (Mrs.Malathy) and PW-4 (Mr.Vijayaragavan) submitted that the first accused being the sister's son of the complainant, was believed and entrusted with the full power to deal with the affairs of the company as its Manager. He was paid salary from the company account. The rent for the premises was paid from the company account. Substantial part of the sale consideration was directly transferred to Malathy and rest through A-1. To the complainant, A-1 said Malathy is the actual owner of the property. Hence, she was also suspected to be an accused in the crime. Only later, it came to light that her husband is the real owner of the property and she was his power agent. Malathy though was shown as an accused in the complaint, her name deleted in the final report and she was examined as PW-3 and her husband Vijayaragavan was examined as PW-4. Her brother Prasad, who witnessed the documents and who was dealing with Ramaraj was examined as PW-2. It is admitted by all of them that the property was purchased in the name of Vijayaragavan and he being employed in Indonesia, his wife PW-3(Tmt.Malathy) through her brother PW-2(Tr.Prasad) let out the premises for rent to Ramaraj. The rent used to be paid through cheques drawn by Phonenix Technologies or by cash by Ramaraj. She agreed to sell the property to Ramaraj for Rs.95 lakhs and received Rs.1,00,000/- in Demand Draft as advance. During July 2007, Ramaraj paid Demand Draft for Rs.15 lakhs and Rs.5 lakhs. Paid cash Rs.20 lakhs during the month of November 2007. As per the agreement, the entire sale consideration was supposed to be paid within 3 months but, there was a delay in paying the sale consideration. When she insisted Ramaraj to pay the balance consideration or they will proceed to sell the property to some other party, he requested some time and he in the month of May, 2008, gave a Demand Draft drawn for Rs.64 lakhs at Malayasian Bank. She encashed it through her account. Ramaraj requested her husband Vijayaragavan to give power of attorney in his name, instead of sale deed. After receiving Rs.5 lakhs, Vijayaragavan executed Power of attorney deed on 02/05/2008 in favour of Ramaraj in respect of the house.

8.Tr.Prasad [PW-2], the brother of PW-3[Tmt.Malathy] and PW-4[Tr.Vijayaragavan] the husband of PW-3 had deposed about the transaction and the mode of receipt of the sale consideration. The receipt of Rs.64 lakhs as Demand Draft from Malayasia is admitted and proved through Ex.P-5 and Ex.P-6 and Ex.P-18, Ex.P-19 & Ex.P-20-bank statements of the defacto complainant's company and the letter from the bank and documents related to NRI account of Malathy. The payment of Rs.15 lakhs and Rs.5 lakhs during the month of June 2007 by Ramaraj through Demand Draft, gets correlated with transfer of Rs.20 lakhs through telegraphic transfer from the account of complainant to the account of A-1 on 06/06/2007 and that money has been used to honour the cheques for Rs.15 lakhs dated 08/06/2007 and for Rs.5 lakhs dated 11/06/2007 drawn in favour of Malathy. These facts are proved through

A-1's bank account statement marked as Ex.P-16 and the statement of accounts of the complainant company Phoenix Technology Corporation marked as Ex.P-17 and the testimony of PW-5 the Manager, Catholic Serian Bank, Kodambakkam.

9.Having thus proved that the sale consideration for the property had emanated from the complainant and A-1 fraudulently got the sale deed Ex.P-4 in his wife favour after getting the power of attorney deed Ex.P3 in his favour from Vijayaragavan, the trial Court rightly held A-1 and A-2 guilty of cheating and criminal breach of trust. However, the lower appellate Court, erroneously reversed the judgement of the trial Court on extraneous reasons without proper appreciation of the fact that the money entrusted to A-1 as the employee under the complainant [PW-1] for purchase of the property has been utilised to pay the vendor and get the property registered in his wife's name. The documents like bank accounts and the evidence on behalf of the vendor (PW-4), his wife (PW-3) and brother-in-law (PW-2) totally ignored and overlooked by the lower appellate Court.

10.The criminal intention to cover the act of deceit well found from the proven fact that A-1, instead of registering the property directly from Vijayaragavan in the name of the company of the Complainant, had asked Vijayaragavan to execute Ex.P-3 power of attorney dated 02/05/2008 in his favour. Thereafter, as power agent he had transferred the property in favour of A-2, his wife through the sale deed Ex.P-4 dated 31/12/2009 showing the sale consideration of Rs.52,60,000/-. While the vendor had specifically deposed that the sale consideration for the property was Rs.1,19,00,000/- and the same substantially received through DD or cheques, the falsity in Ex.P-4 is exposed. However, the lower appellate Court, without applying the correct principle of law, taking note of the entry in Ex.P-5 that the purpose of transferring Rs.64 lakhs from Malaysia by M/s Asia Communication & Electornic SDN BHD to Malathy at India for the business purpose (BARANG), had come to an incorrect conclusion that Rs.64 lakhs paid to Malathy was not for the purchase of the property. This conclusion is perverse and contrary to the own admission of Malathy that she is not carrying on any business. She has no business transaction with anybody in Malayasia and she received Rs.64 lakhs is only towards the sale consideration of the property.

11.Per contra, the learned counsel for the respondents/accused submitted that the error in the trial Court judgment rightly pointed by the lower Appellate Court and reversed the finding of the trial Court. The case of of the complainant is that the money of his company Phonenix Technology Corporation was given to A-1 to purchase the property from PW-3. However, the complaint is not given by the company. No document was produced that PW-1 is the Director of the Company Phonenix Technology Corporation. Further, the specific case of the complainant is that he gave A-1 in Malaysian currency Ringgits (Equivalent to INR 34 lakhs) at Malaysia, during the month of March 2007. However, the entries in the passport of A-1 (Ex.D-1) show, A-1 was not at all in Malayasia during the month of March 2007. The lower Appellate Court properly appreciated and considering the testimony of A-1 examined as DW-1 and the defence documents Ex.D-1 to Ex.D-8, which the trial Court failed to consider, acquitted the accused/appellants.

12.The learned counsel for the respondents/accused submitted that, the owner of the land (Vijayaragavan Rep. by his Power Agent Malathy) earlier filed eviction petition against A-1 before the Court of Small Causes, Chennai and got a decree for eviction (Ex.D-2 and Ex.D-3). The defacto complainant by threat and force obtained deed from A-2 with the help of police and filed a suit before the High Court in C.S.No.247/2010 to declare Ex.P-4-sale deed as void and to direct A-1, A-2, Malathy and her husband Vijayaragavan to reconvey the property to him. The lower Appellate Court on considering these facts acquitted A-1 and A-2 by observing:

> "29.Thus, on appreciation of overall evidence available, this Court is of the view that the blood related, defacto complainant PW-1 and the 1st appellant, knowingly or unknowingly committed violation of foreign exchange for the reasons best known to them with the help of PW-3 and PW-4 and held that it is a fit case to be enquired by Enforcement Directorate and Foreign Exchange and Maintenance Act, 1999. In the case on hand,

the entire prosecution case rests upon the evidence of PW-1, who is neither honest nor trustworthy and highly doubtful and the same does not fit with the human probabilities. The Investigation Officers PW-9 to PW-11 also concentrate their investigation only on seeing the single side of the coin, instead of find out the truth behind the allegations in the complaint, as such held that the learned trial Court has not properly appreciated the evidence. Hence, this Court is of opinion that the judgment of the trial Court be deemed patently erroneous which would be result in miscarriage of justice. The appellant has made out a case for interference with the findings of the trial Court and held that the judgment of the trial Court warrant interference."

13.Heard the learned counsel appearing for the appellant and the learned counsels appearing for the respective respondents. The judgments of the courts below along with the documents and depositions perused.

14.This Court is conscious of the law laid by the Hon'ble Supreme Court, which is repeatedly reiterated by the Courts in India that, on appeal, when the view of the Court below to acquit is probable and legally sustainable, then the order of acquittal shall not be disturbed just because an alternate view is also probable. On acquittal, the accused, who enjoys the benefit of innocence till proved guilty get vested with the additional benefit of the Court finding as not guilty. Hence, the same shall not be disturbed unless the finding of acquittal is perverse and erroneous, suffers no reasoning or reasoning not probable.

15.The learned counsel for the appellant/defacto complainant contended that the prosecution has proved beyond doubt the Employer–Employee relationship between A-1 and PW-1. Through the bank statements and the evidence of PW-3, the payment of consideration for the property, which was purchased in the name of A-2 under the sale deed Ex.P-4 is proved to be made by the defacto complainant either directly to the vendor or through A-1.

16.Contrarily, it is contended by the learned counsel for the respondents that the trial Court failed in not properly appreciated the defence documents. Whereas, the lower Appellate Court appreciated the defence evidence and arrived at the conclusion that the accused are not guilty.

17.In the above background of facts and rival submissions, it is pertinent to analyse, whether the case of the prosecution established through Ex.P-1 to Ex.P-21 and the depositions of PW-1 to PW-11 gets improbablised through Ex.D-1 to Ex.D-8 and the testimony of DW-1.

18.A-1, who has mounted the witness box, has deposed that PW-1 the defacto complainant is his maternal uncle. PW-1 resides in Malaysia and carrying on Railway contract business in India. M/s Phonenix Technology Corporation Limited and Arctic International are the two companies run by PW-1 having its registered office at Bangalore. On behalf of the company, the cheque drawing power was given to one Jayaseelan, the Director and to D.Kamaraj (brother of A-1). DW-1 took the house for rent from Malathy in his name under a written agreement and the company of PW-1 has no connection in respect of the rental contract. The petition in R.C.O.P.No.1355 of 2007 filed by Malathy as power agent of the landlord for eviction against him in his personal name. The said petition was decided against him. PW-1 has instituted a suit in C.S.No.247/2010 in the High Court for declaration of the sale deed in favour of A-2 in respect of the house property at 41-B, Pasumarthy Street, Rangarajapuram, Kodambakkam and for mandatory injunction to reconvey the property in his name. He was not in Malaysia on 15/03/2007 and 16/04/2008. He did not receive Malaysian Ringgits equivalent to INR 34 lakhs from PW-1. He did not receive cheque for Rs.64 lakhs from PW-1. Passport Ex.D-5 will prove it. His income tax assessment order is Ex.P-7.

19.In the cross examination, Ramaraj admits that he joined PW-1 company as Clerk. His brother Kamaraj was one of the Directors of the Company. To be noted that, he has feigned ignorance to the suggestion that the rent was paid by M/s Phonenix Technology and has deposed that only Jayaseelan can answer about the payment of rent. He has denied the suggestion that the money sent to him and Malathy was for purchase of the house, but he has got the property registered in his wife name.

20.Ex.D-7, the income tax assessment order for the Accounting Year 2010-2011 is relied by him, which says, he purchased the property in his wife name by selling her 325 sovereigns of jewels given at the time of her marriage and Rs.10 lakhs from his mother's agricultural income.

21.Ex.D-1 is a document alleged to have been obtained under duress and compulsion with the help of the police. This document is subsequent to the complaint. The reading of Ex.D-2 and Ex.D-3, the proceedings of R.C.O.P.No.1355/2007, we finds that it has been initiated by Vijyaragavan through his wife Malathy as his Power Agent against A-1. It was filed for eviction on the ground of wilful default. A-1 remained exparte. The Miscellaneous petition filed under Section 11(4) of the Building Lease and Rent Control Act, was allowed. Ex.D-7 is the Income Tax Assessment Order for the Assessment Year 2010-2011 passed in the year 2013.

22.The deposition of PW-2 to PW-4 and DW-1 indicates that as far as the landlord Vijayaragavan and his power agent Malathy, W/o Vijayaragavan, they know only Ramaraj and they treated him as their tenant. Malathy in her deposition has admitted that the rent used to be paid by Ramaraj either by cash or by cheque of M/s Phonenix Technologies Limited. She also listed the amount and mode of payments, she received towards the sale consideration for the property, which includes the receipt of Rs.64 lakhs through Telegraphic Transfer made by PW-1 and PW-8. Neither in DW-1 evidence nor through Ex.D-1 to Ex.D-8, the Court finds anything to show the receipts of money narrated by PW-3 and her husband PW-4 sourced from A-1 through his income.

23.The Income Tax Assessment order Ex.D-7 relied by A-1 was passed on 25/03/2013 based on the self-declaration of the assessee i.e A-1, wherein he has declared that he paid the sale consideration of Rs.53 lakhs to Vijayaragavan for purchase of the property by selling his wife jewels and borrowing from his mother. His income through salary was Rs.3,60,000/- and his business income was Rs.4,41,750/- for the assessment year 2010-2011. Ex.D-7 cannot be relied for the purpose of this case and to be rejected outright for the following reasons:-

24.The sale consideration shown to the Income Tax Department as per the sale deed, is much lesser than the actual sale consideration admitted by the vendor PW-3 and PW-4. The sale got registered on 31/12/2008, whereas, Ex.D-7 is dated 25/03/2013 (i.e) much after the complaint dated 20/01/2010. Hence, it is no difficult conclusion to hold that Ex.D-7 came to be passed, based on self- declaration without proper scrutiny.

25.On considering the evidence, this Court holds that, the ingredients for offence of cheating and breach of trust clearly been established through prosecution witnesses and documents. The trial Court has cogently discussed the material evidence placed for consideration and has rightly held A-1 and A-2 are guilty. While so, the lower Appellate Court erred in not properly appreciating the evidence qua the fact in issue (i)whether there was employer-employee relationship between A-1 and PW-3; (ii)whether there was entrustment of property by PW-1 to A-1; (iii)whether the same has been dishonestly misappropriated and converted for the use of A-1 and A-2 and (iv) whether A-1 and A-2 has fraudulently or dishonestly induced PW-1 and PW-8 to give money and deceived them.

26.Instead of deciding these facts in issue, the lower Appellate Court has traversed beyond the fact in issue and the relevant fact. Ignoring the evidence of PW-3 that she received Rs.64 lakhs from Malaysia towards sale consideration of her house, the lower Appellate Court has presumed that there is violation of foreign exchange regulation and PW-1 and PW-8 had deposed to suit their convenience that the money sent from Malaysia to Malathy was not for business (BARANG) and PW-3 and PW-4 had helped PW-1 and PW-8 to violate FEMA.

27.Even assuming that PW-1 has transferred the money from Malayasia to PW-3 in India without proper declaration and thereby, he has violated the Regulations under FEMA, it does not mean that, his employee(A1) can misappropriate the money transferred improperly and get a property fraudulently registered in the name of his wife-A-2. The lower Appellate Court had miserable failed to understand the law of the land.

28.The learned lower Appellate Court Judge has assumed that, "Stealing from a thief is not an offence". He is not aware of the law that even if the money or property is tainted or proceeds of crime, if it is stolen/robbed/extorted/misappropriated by others, such act makes a offence under Panel Code, which is distinct and different offence. In the view of the lower appellate Court the improper transfer of foreign currency may be in violation of FEMA, but misappropriation of employer's money is a different and distinct offence. Because, A-1 and A-2 misappropriated the money improperly transferred from Malaysia, their crime does not get washed off. As far as the case tried against the accused A-1 and A-2, the fact in issue is whether the money of PW-1 was misappropriated and cheated by A-1 and A-2. The Appellate Court has traversed beyond the scope of the appeal to answer whether money transferred from Malaysia with proper declaration or not.

29.Therefore, for the reasons stated, the illegality and perversity in the lower Appellate Court judgment needs interference.

30.**Accordingly, the Criminal Appeal is allowed.** The judgment of the lower Appellate Court viz., the XVII Additional Judge, City Civil Court, Chennai rendered in C.A.No.158/2015, dated 07/03/2016 is set aside. The judgement of conviction and sentence of the trial Court viz., XI Metropolitan Magistrate Court, Saidapet, Chennai, made in C.C.No:3933/2011, dated 28.07.2015, is restored. 30 days time is granted for the accused to surrender. Failing which the accused A-1 and A-2 be secured and remanded to prison to undergo the sentence.

03.08.2022

Index:yes
Speaking order/non speaking order
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To:
1.XVII Additional judge, City Civil Court, Chennai.
2.XI Metropolitan Magistrate Court, Chennai.
3.The Inspector of Police, Central Crime Branch, Vepery, Chennai.
4.The Public prosecutor, High Court, Madras.

DR.G.JAYACHANDRAN,J.

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Delivery judgment made in
Crl.A.No.464 of 2016

03.08.2022