



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.12.2015

CORAM

THE HONOURABLE MR. JUSTICE M. VENUGOPAL

Crl.R.C. (MD).No.586 of 2015

WEB COPY

A.Vijayarani

: Revision Petitioner/Accused

-Vs-

A.Sivashanmugam

: Respondent/Complainant

PRAYER: Petition is filed under Section 397 r/w. 401 of the Code of Criminal Procedure praying to call for the records in CA Number 55 of 2015 on the file of the learned Principal Sessions Judge, Karur and set aside the order dated 03.11.2015 passed in CRL MP Number 1061 of 2015 and also pass further orders suspending the substantive sentence issued by the learned Judicial Magistrate, Fast Track Court, Karur in C.C.No.107 of 2012 vide order dated 09.09.2015.

For Petitioners : Mr.N.Ananthapadmanabhan

For Respondent : Mr.N.Satheshkumar

O R D E R

The Revision Petitioner/Accused has preferred the present Criminal Revision Petition as against the order dated 03.11.2015 in Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015 passed by the Learned Principal Sessions Judge, Karur.

2.The Learned Principal Sessions Judge, Karur while passing the impugned order in Crl.M.P.No.1061 of 2015 filed by the Revision Petitioner/Accused in C.A.No.55 of 2015 on 03.11.2015 had inter alia observed that

" Heard both sides.

The Learned Counsel for the petitioner submitted that the petitioner has been convicted by the Learned Judicial Magistrate (FTC), Karur on 16.04.2015 in C.C.No.107 of 2012 and the petitioner was sentenced to undergo simple imprisonment for five months for the offence under Section 138 of N.I.Act. According to him, in the absence of the accused, the judgment and order of sentence was passed by the trial Court and immediately the trial Court issued a NBW to secure the petitioner to undergo the period of sentence. He therefore prayed for suspension of the sentence passed by the trial Court till the disposal of the criminal appeal.

The respondent has raised objection for the petition and it is for the petitioner to move the trial Court to get the appropriate relief on surrender of the accused and that this petition is not maintainable before this Court" and



considering the facts and circumstances of the case directed the Revision Petitioner to surrender before the trial Court, that on such surrender, the Trial Court was directed to dispose of the application under Section 70(2) of Cr.P.C in accordance with Law.

3. Being aggrieved against the order dated 03.11.2015 in Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015, the Petitioner/Accused has preferred the instant Criminal Revision Petition before this Court primarily contending that the impugned order passed by the Learned Principal Sessions Judge is to be set aside by this Court, since the same is against law.

4. The Learned Counsel for the Petitioner/Accused vehemently contends that the ingredients of Section 389(1) of Cr.P.C are very clear and in an unambiguous fashion enjoins the appellate Court to suspend the execution of the substantive sentence itself and in the event of appellant suffering incarceration, he may be (*) **released** on bail on his own bond.

5. The Learned Counsel for the Petitioner/Accused proceeds to take a stand that in case of summary procedure, where law provides for adjudication of case in the absence of an accused, the Trial Court should have stipulated the time frame within which the accused should prefer an appeal or surrender to save the substantive sentence, as such, the Trial Court had committed an error in issuing the Non-bailable warrant on the date of passing the judgment in C.C.No.107 of 2012 dated 09.09.2015. Furthermore, the appellate Court while dismissing the Crl.M.P.No.1061 of 2015 filed by the Revision Petitioner had fallen into even more grave error in dismissing the suspension of sentence petition, simply on the ground that non-bailable warrant is pending against the Revision petitioner/accused.

6. In effect, the submission of the Learned counsel for the Revision Petitioner/Accused is that the dismissal of Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015 dated 03.11.2015 passed by the Learned Principal Sessions Judge, Karur, if allowed to stand will result in serious miscarriage of justice.

7. Also, it is represented on behalf of the Revision Petitioner/Accused that the trial Court should have issued notice to the Petitioner/Accused prior to the passing of the judgment in C.C.No.107 of 2012 on its file dated 09.09.2015 and the deliverance of justice even in the absence of the Counsel, the petitioner is put to irreparable loss and hardship.

8. The Learned counsel for the Petitioner cites the decision of this Court *R.Sarathkumar v. The Inspector of Police, C-9, Police Station, Neelankarai, Chennai* reported in 2004 MLJ(CRL.) 421, under it is observed and reads as follows:

"Non-bailable warrant issued without a preceding bailable warrant where the offence is bailable, is not in



accordance with the scheme of the criminal procedure code and hence, illegal. Therefore, while exercising the power conferred under Section 87, Cr.P.C., and issuing a warrant, in a case of bailable offence, the Magistrate shall always issue at the first instance a bailable warrant (including the endorsement provided under Section 71, Cr.P.C.). If the person does not appear before the Court even after execution of bailable warrant, then, and only then the Magistrate may issue a non-bailable warrant. Therefore, in all cases under Sec.138 of the Negotiable Instruments Act, though it is possible or there is no legal infirmity for the Magistrate to issue a non-bailable warrant for the reasons to be recorded in writing, yet, considering the bailable nature of the offence, under Section 138 of the Negotiable Instruments Act the Magistrate shall always issue "bailable warrant" at the first instance. For the above reasons there appears no reason or no circumstances warranting the issue of non-bailable warrant in this case."

9. He also seeks an aid of the decision of this Court *Sundar alias Sundararajan v. The Inspector of Police, All Women Police Station, Palayamkottai, Tirunelveli District* reported in 2001 MLJ (Crl.) 563. Special Page 566 at paragraph Nos.6 and 7 wherein it is observed and held as under:

"6. If the accused appears before the appellate Court pursuant to the warrant pending against him, the accused is deemed to have come to the judicial custody, which amounts to confinement.

7. Therefore, in the peculiar circumstances of this case, in case, the accused appears before the appellate Court, the appellate Court is directed to recall the warrant and the moment the warrant is recalled, the execution of the sentence passed against the accused, shall stand suspended and the appellate Court is directed to release the petitioner on bail on his executing a bond for Rs.5,000/- with two sureties for the like sum to its satisfaction pending disposal of the revision."

10. Added further, the Learned counsel for the petitioner refers to the order dated 29.09.2015 passed by this Court between *S. Sivanesan v. K. Dheenaseenan* whereby and whereunder in paragraph Nos.2 to 5 it is observed and held as follows:

"2. This order is under challenge in this revision petition. The petitioner herein was ordered to undergo simple imprisonment for a period of six months for the offence under Section 138 of Negotiable Instruments Act. It appears that on the day of Judgment, the petitioner appeared before the Court and that made the learned Sessions Judge, to pass an order directing him to appear before the trial Court.



12. In effect, the Section 353 of Cr.P.C provides the manner in which the judgment is to be delivered. It is to be remembered that Section 354 of Cr.P.C declines what judgment should contain, if all judgment is expressing of an opinion of the Court after due consideration of evidence and the arguments advanced. Where the case is posted for judgment, the trial of the case stands terminated within the meaning of Section 353 of Cr.P.C., Judgment shall be pronounced immediately after conclusion of the trial or at some subsequent time of which notice shall be given to the parties or their pleader which specified in Clause(a), (b) and (c) of Sub-Section 1 of Section 353 of Cr.P.C.



13. Apart from the above, Section 70 of Cr.P.C, speaks 'Form of warrant of arrest and duration'. It is to be borne in mind that even if the learned counsel is not present, but the accused is present, the Court would decide the application for recall of warrant on merits, as per decision *Deivasigamani v. State*, 2003 MLJ(Crl.) 201(Mad). In terms of Section 70(2) of Cr.P.C., the Judicial Magistrate has all necessary powers to consider the orders as regards the issuance of a 'non-bailable warrant'. It is for the Court, if convinced that the absence of an accused was not wilful the warrant should be recalled as per decision *Yogesh Kumar Bhargava v. State of Uttarpradesh* reported in 2001 Crl. L.J, 2835, 2836(All).

14. It is not out of place for this Court to make a relevant mention that the Judicial Magistrate under Section 70 of Cr.P.C can convert a warrant of arrest into a Bailable Warrant. Also that the warrant once issued is very much alive, until it is cancelled or executed even though it specifies a returnable date as per the decision *Inder Mandal*, AIR 1967 Patna 141. Where the issuance of non-bailable warrant is unwarranted, the High Court by exercising its discretion can quash the said 'Non-Bailable warrant' as per decision *H.C.JAIN v. M/s.R.K.SYNTHETICS AND FIBRES PVT. LTD.*, reported in 1999 Crl.L.J. 2922 (BOM).

15. At this stage, this Court aptly points out the decision *Deivasigamani* and another vs. The State represented by the Inspector of Police, Central Crime Branch, Chennai reported in (2003)MLJ(Crl.) 201(Mad) whereby and where under it is observed and laid down as follows:

"10. In the case on hand, the petitioners herein were unable to appear before the trial court on 13-08-2002 and given instructions to the counsel and prayed for dispensing with their appearance. Unfortunately, the counsel could not represent the petitioners, with the result Non-bailable warrant was ordered on the same day on 13-08-2002, returnable on 23-08-2002. It is evident that on 23-08-2002 the petitioners have filed an application under Section 70 (2) of Cr.P.C. to recall the warrant. On that day, the counsel for the petitioners herein did not appear when the case was called. Immediately, the same was dismissed after calling, without noting the fact that the petitioners were very much available in the court. The impugned order of remand also disclose the said fact that the petitioners were present along with other accused, but they were remanded to judicial custody consequent to the order of dismissal of their petition to recall the warrant. Apparently, when the petitioners surrendered before the court with an application to recall the warrant, dismissal of the same mechanically without considering it on merits is unreasonable. While



so, the remand order passed by the Magistrate is unsustainable. Admittedly, in the impugned order of remand, no reason has been assigned by the learned Magistrate. Admittedly, no witnesses were present on the day of remand. Indeed, the petitioners have proved their bonafide by filing a petition explaining the reason for their non-appearance on 13-08 -2002. PW1 also deposed before the said court that he has no intention to proceed against the petitioner herein as they have already settled the amounts payable by them. Beyond that, the petitioners are all respectable persons occupying higher post in the State Government. While so, without considering the above factors, remanding the petitioners mechanically would amount to exercise of discretionary power in an unjudicial and arbitrary manner. Hence, interference of this Court is very much warranted."

16.It is to be remembered that a warrant remains valid unless it is executed or cancelled. Mere issuance of Non-bailable warrant in a given case without considering all the aspects would not be an exercise of judicial powers, in the considered opinion of this Court.

17.Per contra, **(*) the Learned Counsel for the Respondent/Complainant** submits that the appellate Court had rightly dismissed the CrI.M.P.No.1601 of 2015 filed by the Revision Petitioner/Appellant/Accused on 03.11.2015 by assigning proper reasons and in view of the fact that the Revision Petitioner/Appellant/Accused had absented herself on the date of judgment before the trial Court and when an order of sentence was passed by the trial Court, it immediately issued non-bailable warrant to secure the presence of the Revision Petitioner to serve the period of sentence awarded and as such, this Court at this distance point of time, may not allow the Criminal Revision Petition filed by the petitioner, in furtherance of substantive cause of justice.

18.At this juncture, the Learned Counsel for the Respondent/Complainant refers to paragraph Nos.3 and 4 of the averments made in CrI.M.P.No.1061 of 2015 in C.A.No.55 of 2015 on the file of the appellate Court which reads as under;

"3.When the complaint has spoken about monetary transaction between the appellant and himself, it is very much necessary and essential to prove the transaction by means of proving the actual payment of money which is the consideration for the promissory note alleged to be executed on the date of borrowal.

4.When the complaint who was examined himself as prosecution witness number one categorically admitted before the trial Court that he is an agriculturist and he has no other means of income



and his annual income itself is only Rs.2 lakhs, it is very much necessary on his part to establish that he was able to keep rupees four lakhs at any given point of time."

19. Also, the Learned counsel for the Respondent/Complainant refers to the averments made in Paragraph B and C of the Criminal Revision Petition (MD) No.586 of 2015, which reads as under:

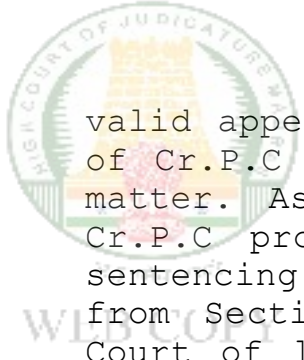
"B. It is further submitted that in the course of the trial, the petitioner accused above named had fallen sick and became seriously ill, bedridden with severe cardiac arrest and also underwent angioplasty. She's a severe and chronic diabetic patient and because of the various factors she had temporary paralysis of the upper limbs and was forced to take bed rest and treatment at Kauvery Hospital at Tennur, Trichy.

C. It is further more submitted that the petitioner was absent due to her physical condition for many hearings before the trial Court and on 09.09.2015, the day when the case was posted for judgment and the counsel for the petitioner also was incapacitated due to breakdown of his vehicle as he is a resident of Musiri and hence, petition to condone the absence of the accused could not be filed before the trial Court on the date of hearing that is on 09.09.2015."

and that there are discrepancies/inconsistencies/variance between averments made by the petitioner before the appellate Court in CrI.M.P.No1061 of 2015 and the averments made in Paragraph B and C of Revision Petition. As such, the Revision Petitioner/Appellant/Accused has come to this Court with unclean hands and based on equity is not entitled to seek the relief from the hands of this Court sitting in Revision.

20. Besides above, the Learned counsel for the Respondent/Complainant contends that if this Court is inclined to allow the Criminal Revision Petition filed by the Revision Petitioner/Appellant/Accused, then it may be direct the Revision Petitioner/Appellant/Accused to remit some sizeable portion of the money ie., half of the amount viz., Rs.2,00,000/-, as deposit before the Appellate Court to the credit of an Appeal.

21. It is to be relevantly pointed out that Section 389 of Cr.P.C applies only to the affected person. Sub-Section(1) of Section 389 of Cr.P.C empowers an appellate Court to suspend execution of sentence or when the affected persons is in confinement to grant bail (suspension of the offence being ~~applicable~~ pending any appeal before it. The condition precedent for exercising of the jurisdiction by a Court of law Section 389(1) of Cr.P.C is an existence of appeal, which means a



valid appeal presented before the concerned Court. Section 389(2) of Cr.P.C gives concurrent jurisdiction to the High Court in the matter. As a matter of fact, Sub-Section 3 of Section 389 of Cr.P.C provides for granting bail to the affected persons by sentencing Court pending appeal no certain circumstances. Apart from Section 389(1) of Cr.P.C, there is an inherent powers of Court of law Section 482 Cr.P.C to grant a relief of said in a given case. While suspending the suspension of sentence, it is advisable/desirable that the appellate Court imposes a condition of deposit of the compensation amount in Court within certain period. If the fine sum is on the higher side, the Court can direct atleast a portion thereto to be remitted. In short, the Appellate Court, under Section 389 of Cr.P.C while suspending the sentence an enlarge a person on bail, imposing necessary terms. In this regard, the power of an Appellate Court is crystalline clear, in the considered opinion of this Court.

22.Insofar as the 'relief of suspension of sentence', it is to be pointed out that, in respect of Revision against the conviction an accused need not surrender and undergo confinement for seeking the relief of suspension of sentence pending disposal of the Criminal Revision. However, the Revisional Court, may decline to exercise power under Section 397 (1) of Cr.P.C to suspend the sentence impose on the accused, considering the merits of each case in respect of the seriousness and gravity of offence and also the incarceration of the accused coupled with quashing materials available on record against the accused as per the decision *Markandan vs. Inspector of Police, Deevattipatti Police Station, Salem* reported in 2007(1) MLJ(Crl.) 210(Mad).

23.Also that, in the decision *Ibrahim vs. State of Kerala* reported in 1997 KLT 857, at para No.5 it is observed and held as under:

5.In respect of the same question of law viz. Whether the accused concerned in the revision against conviction, has to surrender and thereafter only seek relief of suspension of sentence, the Honounrable Mr.Justice Khalid (as he then was) has held in the decision reported in *Ibrahim v. State of Kerala* 1979 KLT 857 as follows:

"2.Section 397, 399 and 401 of the Code deal with powers of revision. Under Section 397, revisions can be filed both before the High Court and the Sessions Judge. The jurisdiction of the revisional Court to pass interim orders under Section 397(1) is as follows:

"(1)The High Court or any Sessions Judge may call for and examine the record of any proceeding by or from any inferior Criminal Court situated within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness,



legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

The words "direct that the execution of any sentence or order be suspended" have to be read-conjunctively from the words and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record. Suspension of the execution of any sentence or order postulates that the petitioner is not in confinement. This Section gives jurisdiction to the revisional Court to suspend sentence even though the petitioner is not in confinement. The question of releasing him on bail arises only when he is in confinement. Therefore, when the accused in confinement makes an application for suspension of sentence or order, the Court should not only order suspension of the sentence or order by order his release on bail also. Not so, when he is not in confinement. This Section clearly recognised the difference between a case where an accused is in confinement and when not in confinement. Thus, it will not be proper for the revisional Court to insist upon an accused to be remanded to confinement before his sentence can be suspended, for, that will be acting against the clear and express provisions contained in Section 397(1) of the Code, quoted above, enabling the revisional Court to exercise the twin jurisdiction vested in it in cases where the accused is in confinement and not in confinement. The matter becomes clear when the other sections of the Code are also considered.

.....

8. the revisional Court need not insist upon the confinement of the accused before ordering suspension of sentence or order passed against him. If the accused is in confinement, the revisional Court will have to direct his release on bail; if he is not in confinement, the revisional Court will have to direct his release on bail; if he is not in confinement, the revisional Court need only suspend the execution of the sentence or order, either on the bond already executed or as directed by the revisional Court. Since the relevant provisions of the Code have clearly delineated the situation where the accused presence is necessary,



and since Section 397 is silent about the custody or confinement of the accused, the revisional Court need not insist upon bringing the accused to confinement before exercising the powers under Section 397(1) of the Code."

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24.Be that as it may, in view of the fact that in respect of the Revision against conviction and sentence for granting the relief of suspension of sentence, the accused need not surrender and undergo confinement and preferring of revision without surrendering and confinement is well within the ambit of Section 397 (1) of Cr.P.C, this Court to prevent an aberration of justice and to promote substantive cause of justice, sets aside the impugned order, dated 03.11.2015 in Cr.M.P.No.1061 of 2015 in C.A.No.55 of 2015, passed by the learned Principal Sessions Judge, Karur. Consequently, the Criminal Revision Petition succeeds.

25.In the result, the Criminal Revision Petition is allowed. Resultantly, the order dated 03.11.2015 in Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015 passed by the Learned Principal Sessions Judge, Karur is hereby set aside by this Court for the reasons assigned in this Criminal Revision. The Learned Principal Sessions Judge, Karur is directed to restore Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015 to file and to dispose of the Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015 afresh in the manner known to Law and in accordance with Law, after providing adequate opportunities to both parties, by adhering to the principles of natural justice. Liberty is granted to the respective parties, to raise all factual and legal pleas at the time of fresh hearing of Crl.M.P.No.1061 of 2015 in C.A.No.55 of 2015. It is open to the Revision Petitioner/Accused to file necessary miscellaneous petition before the trial Court and to seek the relief of recall of warrant/cancelling the warrant in the manner known to Law and in accordance with Law, if she so desires/ advised.

Sd/-

Assistant Registrar(R)

(*) CORRECTED ORDER ISSUED

/True Copy/

Sub-Assistant Registrar

To

1.The Principal Sessions Judge,Karur.

2.The Judicial Magistrate, Fast Track Court, Karur

+One cc to Mr.M.Ananthapadmanabhan, Advocate, SR.No.75687

+One cc to Mr.N.SathishKumar, Advocate, SR.No.15528

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