BAIL SLIP

The petitioner/Accused namely J.Ebeneser, S/o.Jonathan was released on bail dated 21.06.2011 made in Crl MP No.1 of 2011 in Crl.R.C.No.770 of 2011 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2019

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl.R.C.No.770 of 2011

J.Ebeneser ... Revision Petitioner/Accused

Vs.

S.Jeyachandran ... Respondent/Complainant

Prayer : Criminal Revision Case filed under Section 397 and 401 Cr.P.C., praying to set aside the judgment and sentence dated 26.04.2011 in C.A.No.48 of 2010 on the file of the Additional District Judge/FTC No.III, Coimbatore confirming the judgment and modifying the sentence dated 05.03.2010 in S.T.C.No.124 of 2008 on the file of the Judicial Magistrate Court No.VII, Coimbatore.

For Petitioner : Mr.R.Vivekananthan

For Respondent : Mr.L.Mahendran

O R D E R

This Criminal Revision Case has been filed to set aside the judgment and sentence dated 26.04.2011 in C.A.No.48 of 2010 passed by the Additional District Judge, Fast Track Court No.III, Coimbatore, confirming the conviction and modifying the sentence dated 05.03.2010 in S.T.C.No.124 of 2008 on the file of the Judicial Magistrate Court No.VII, Coimbatore.

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

3.It is the case of the complainant that the accused was his close friend; the accused borrowed Rs.10,00,000/- (Rupees Ten lakhs only) on various dates, from October 2005 onwards, but, did not repay any money; therefore, the complainant filed a petition under Section 482 Cr.P.C. before the High Court of Madras for registration of a case against the accused for cheating; on the direction of the High Court, the District Crime Branch, Coimbatore, conducted enquiry; during the enquiry, the accused voluntarily came forward to amicably settle the matter and gave Rs.2,00,000/- (Rupees Two lakhs only) by cash on 18.05.2007 and also issued three cheques as follows;

S.Nos.	Cheque amount	Dated	Marked before the trial Court as
1.	Rs.3,00,000/-	20.06.2007	Ex.P1
2.	Rs.4,00,000/-	10.07.2007	Ex.P2
3.	Rs.1,00,000/-	15.07.2007	Ex.P3

the complainant presented all the three cheques on 10.12.2007, however, they were returned unpaid, stating that funds were insufficient, vide Bank's memos dated 11.12.2007 (Exs.P4, P5 and P6); the complainant issued the statutory demand notice dated 04.01.2008 (Ex.P7), which was received by the accused on 07.01.2008 (Acknowledgment Card Ex.P8); the accused sent a reply letter dated 07.01.2008 in xerox (Ex.P9), addressed to the counsel for the complainant, through post (Ex.P10), agreeing to pay a sum of Rs.8,00,000/- before 10.02.2008; the accused did not make any payment and hence, the complaint.

4. During the pendency of the complaint, the accused entered into an agreement (Ex.P11) with the complainant, agreeing to pay the sum of Rs.8,00,000/- in three instalments, viz. Rs.4,00,000/- on 24.11.2008, Rs.2,00,000/- on 28.11.2008 and Rs.2,00,000/- on 02.12.2008.

5.On the appearance of the accused, he was furnished with the copy of the complaint and when he was questioned under Section 251 Cr.P.C., he denied the accusation.

6.To prove the case, the complainant examined himself as P.W.1 and marked Exs.P1 to P11.

7.When the accused was questioned under Section 313 Cr.P.C., he stated that, the complainant had taken Rs.5,50,000/- for sending his son (son of the accused) abroad, but, did not send him; when the accused demanded return of the amount, the complainant executed a Power of Attorney in respect of a property belonging to him, on the strength of which, the accused sold the property; the three cheques were obtained by the complainant in the police station by coercion.

8. The accused examined himself as D.W.1, however, did not mark any document. The accused, in his evidence, has stated that he gave Rs.2,00,000/- to the complainant for sending his son Jeswin Davidson abroad, but the complainant neither sent him, nor returned the money; when he started demanding return of the money, the complainant has set up a case, as if, the complainant had given a loan of Rs.10,00,000/- to him; he gave three cheques in the office of the District Crime Branch, Coimbatore, during police enquiry under coercion; he neither sent the reply letter (Ex.P9), nor entered into the agreement (Ex.P11).

9.After considering the evidence on record and hearing either side, the trial Court, by judgment dated 05.03.2010 in S.T.C.No.124 of 2008, convicted the accused for the offence under Section 138 of the Negotiable Instruments Act, 1881, and sentenced him to undergo one year rigorous imprisonment and to pay Rs.10,00,000/- as compensation to the complainant, under Section 357 Cr.P.C.

10.Challenging the conviction and sentence, the accused filed Criminal Appeal in C.A.No.48 of 2010 before the Court of Session, which was heard by the Additional District Judge (Fast Track Court No.III), Coimbatore. Before the appellate Court, the accused filed a petition under Section 391 Cr.P.C. for adducing additional evidence. This petition was dismissed by the appellate Court on 20.09.2010. Challenging the order, the accused approached the High Court and on the direction of the High Court, the accused was once again examined as D.W.1 before the appellate Court and Exs.D1 and D2 were marked.

11.The appellate Court considered the evidence on record and dismissed the appeal on 26.04.2011, challenging which, the accused preferred the present revision petition and this Court suspended the sentence and released him on bail.

12.On 06.12.2018, this Court passed the following order :

> "The accused, who is the revision petitioner, has been convicted and sentenced by the trial Court and the appellate Court under Section 138 of the Negotiable Instruments Act, 1881. His sentence has been suspended by this Court in M.P.No.01 of 2011 on 21.06.2011, on condition that, he should appear before the Judicial Magistrate No.VII, Coimbatore, on the first working day of every month at

10.30. a.m. till the disposal of this revision petition.

2.This revision petition has been filed by the accused through Ms.Sugirdha Selvaraj, Advocate and Mr.L.Mahendaran, Advocate has entered appearance for the respondent/complainant.

3.After the revision petition was admitted, the matter was referred to the Lok Adalat for settlement. The accused and the complainant appeared before the Lok Adalat on 16.02.2012 and filed a memo of compromise, under which, the accused agreed to pay Rs.6,00,000/- and also to give 15 sovereigns of gold to the respondent/complainant as full and final settlement.

4.After having so agreed before the Lok Adalat, the accused did not comply with the terms of the agreement. Therefore, Justice Malai Subramanian (Retd.), Chairman of the Lok Adalat, passed the following order on 28.09.2012:

> "This Criminal revision case was settled in the presence of both parties and their advocates and the award has also been passed by consent of both parties on 16.04.2012. The petitioner failed to comply with the award despite sufficient indulgence shown by the Adalat. Today the learned counsel for the petitioner has filed a memo stating that the petitioner has not complied with the consent order and therefore, the matter may be referred back to Court. The memo shall form part of this note. Accordingly, the matter is referred back to Court."

5.Mr.K.Selvaraj and Ms.Sugirdha Selvaraj, counsel filed a memo dated 11.07.2006, withdrawing their appearance for the revision petitioner/ accused.

6.Therefore, this Court called for a report from the learned Judicial Magistrate No.VII, Coimbatore, as to whether, the petitioner/accused is complying with the bail conditions by reporting on the first working day of every month, for which, the learned Judicial Magistrate No.VII, Coimbatore has sent a report dated 21.06.2016 stating that the accused appeared from 01.08.2011 to 01.06.2016 and thereafter, he has not complied with it. Therefore, it is not known, whether the revision petitioner/accused is still alive.

7.The revision petitioner/accused was represented by Mr.P.Sundarabalan, Advocate in STC.No.124 of 2008 before the Judicial Magistrate No.VII, Coimbatore and before the Additional District Judge (Fast Track Court No.III), Coimbatore in C.A.No.48 of 2010. Therefore, the Judicial Magistrate No.VII, Coimbatore is directed to inform Mr.P.Sundarabalan, Advocate, Coimbatore about pendency of this revision petition by serving on him a copy of this order, so that, the accused if alive, could take measures to enter appearance. The learned Judicial Magistrate No.VII, Coimbatore is also directed to verify the whereabouts of J.Ebenesar, S/o.Jonathan, No.7, Sundar Garden, C.S.I.Church, TVS Nagar, Idayarpalayam Coimbatore, through the jurisdictional Police and serve notice to J.Ebenesar for the hearing on 19.12.2018. The learned Judicial Magistrate No.VII, Coimbatore is directed to send a report to this Court before 19.12.2018.

Post "for orders" on 19.12.2018."

13.Pursuant to the direction issued by this Court, the Judicial Magistrate No.VII, Coimbatore, submitted a report dated 13.12.2018, which reads as follows :

"I humbly submit that as per the direction of the Hon'ble High Court, Madras in Criminal Revision Case No.770/2011 dated 06.12.2018. This Court to informed Mr.P.Sundarabalan, Advocate, Coimbatore on 10.12.2018 about pending of this revision petition by serving on him a copy of the order in Criminal Revision Case No.770/2011 dated 06.12.2018.

Further I submit that on 12.12.2018 Mr.P.Sundarabalan, Advocate, Coimbatore filed a memo stating that the Ebeneser with his clutches upto end of the appeal before the Hon'ble Additional District Judge (Fast Track Court No.3) Coimbatore in C.A.No.48/2010. Thereafter there is no contact with him.

Further I submit that as per the direction of the Hon'ble High Court, Madras to verify the whereabout of J.Ebeneser S/o.Jonathan, No.7, Sundar Garden, CSI Church, TVS Nagar, Idayarpalayam, Coimbatore and serve notice to J.Ebenesar. On 10.12.2018 this Court directed to the Inspector of B11 Saibaba Colony Police Station Coimbatore. On 13.12.2018 the Inspector of Police B11 Saibaba Colony, Coimbatore filed a report stating that "not known whereabout the said J.Ebeneser, further one named Shrif reside the address No. 7, Sunder Garden, CSI Church, TVS Nagar, Idayarpalayam, Coimbatore. Further the Inspector enquired one Sivanantham who reside in the nearest house of said address who stated that for the past 6 years back the said J.Ebeneser reside in the address at present not know whereabout the said J.Ebeneser.

Hence, I humbly submit that I hereby enclosed the memo of Mr.P.Sundarabalan, Advocate, Coimbatore and the report of the Inspector of B-11 Saibaba Colony Police, Coimbatore."

14.Therefore, this Court appointed Mr.R.Vivekananthan, learned Advocate (Enrollment No.639 of 2002) of more than 10 years standing in the criminal bar to argue the case of the accused. He was furnished with the relevant records.

15.Heard Mr.R.Vivekananthan, learned counsel for the accused and Mr.L.Mahendran, learned counsel for the complainant.

16.Before adverting to the rival submissions, it may be relevant to state here that, while exercising powers under Sections 397 and 401 Cr.P.C., this Court cannot re-appreciate the evidence like a second appellate Court, as held by the Supreme Court in State of Maharashtra v. Jagmohan Singh, Kuldip Singh Anand & Ors. [2004 7 SCC 659].

17.Mr.R.Vivekananthan contended that the impugned cheques were admittedly obtained in the police station and therefore, it is obvious that, they have been obtained under coercion. In support of this contention, he placed reliance on an unreported judgment of this Court in M/s. Sincere Agencies through its Partner K.R.Muthappan v. S.Arunachalam, dated 07.08.2018.

18.Per contra, Mr.L.Mahendran refuted the contentions put forth by the learned counsel for the accused.

19.In this case, the fact that the cheques were issued during the pendency of the police enquiry was not brought to light, either in the cross-examination of the complainant or otherwise. From the inception, the complainant has taken the stand that, the accused was his close friend and he had borrowed monies in instalments from October 2005 onwards and had repudiated the debt, leading to the complainant approaching the

High Court for a direction to the police to register a regular FIR for cheating. The complainant himself has stated that, only during the pendency of enquiry, the accused gave Rs.2,00,000/- by cash and for the balance of Rs.8,00,000/-, he gave three post-dated cheques i.e. Ex.P1 dated 20.06.2007, Ex.P2 dated 10.07.2007 and Ex.P3 dated 15.07.2007. The complainant did not present the cheques on the date mentioned in the cheques, but, presented all the three cheques, only on 10.12.2007.

20.Had the accused given those three cheques under coercion, he could have easily given instructions to the Bank to stop payment and could have issued a legal notice to that effect, to the complainant. When the complainant issued the statutory notice (Ex.P7), the accused did not choose to repudiate the transaction, instead, he sent a letter (Ex.P9) dated 07.01.2008, addressed to the counsel for the complainant, who had sent the statutory notice (Ex.P7) to him. It is seen that the said letter is a photocopy and this was raised as an issue before the trial Court. It is the case of the complainant that his Advocate received the photocopy in a postal cover (Ex.P10) and the postal cover bears the handwriting of the accused. The accused has entered into the agreement (Ex.P11) during the pendency of the prosecution, agreeing to repay the sum of Rs.8,00,000/- in three instalments, which agreement also, he repudiated, in his examination as D.W.1.

21.It may be relevant to state here that, when the matter was pending before the High Court, the accused appeared before a retired Judge of this Court on 16.02.2012 and filed a memo of compromise. Thereafter, that memo of compromise had also been repudiated by the accused.

22.As regards the contention of Mr.R.Vivekananthan that the cheques having been issued during the police enquiry will stand vitiated, this Court is of the view that, it cannot be stated as a thumb rule that, whatever happens during police enquiry deserves to be discarded. It depends upon the facts and circumstances of each case.

23.In this case, the complainant himself has stated that, after he had obtained the orders from the High Court, the police commenced enquiry and during the enquiry, the accused came forward and gave three post-dated cheques. As stated earlier, the accused could have either issued instructions to the Bank to stop payment or replied to the notice of the complainant that, the cheques were obtained under coercion, without any corresponding liability on him. However, the accused had not chosen to do either of the above. Moreover, in the cross-examination of the complainant, the accused has suggested that the three cheques viz. Exs.P1 to P3 were given to the complainant, through an Advocate, which suggestion, the complainant admitted. This clearly shows that, an Advocate for the accused was available during the police enquiry and only through him, the three cheques were issued by the accused to the complainant.

24.Leaving aside that, the conduct of the accused, in initially sending a photocopy of the letter (Ex.P9), agreeing to pay the amount to the complainant, and later, denying the very issuance of the letter, appears to be queer. The complainant has marked the postal cover (Ex.P10), in which, the said letter was posted and sent to the counsel, who issued the statutory notice to the accused. Whatever the counsel had received, have been marked as primary evidence. The accused has also repudiated the agreement entered into with the complainant (Ex.P11), for no good reason. In fact, additional evidence was also adduced before the appellate Court by the accused in this case and no worthwhile documents were marked.

25.Thus, in the facts and circumstances of this case, the finding of the trial Court and the appellate Court that, though the cheques were issued during police enquiry, they were not issued under coercion or threat, does not require interference by this Court.

26.In the result, this Criminal Revision Case stands dismissed as being devoid of merits.

27.The trial Court is directed to secure the accused and commit him to prison for undergoing the sentence imposed upon him.

This Court places on record, its appreciation for Mr.R.Vivekananthan, learned Advocate, for accepting this case and presenting the same deftly.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge,
   Fast Track Court No.III,
   Coimbatore.

2.The Judicial Magistrate No.VII,
   Coimbatore.

+1 cc to Mr.L.Mahendran, Advocate Sr.No.918

Crl.R.C.No.770 of 2011

SR(CO)
CSL/05.02.2019