Bail Slip

M.Pushpasekaran, S/o.Mariappan Goundar Accused in STC . NO.219/09 on the file of the Judicial Magistrate,No.5,Salem and confirmed in CA.NO.71 of 2013 dated 26.03.2014 on the file of the Principal Sessions Judge,Salem was enlarged on bail vide this Court order dated 15.05.2014 in MP.NO.1/14 IN CRL RC.NO.500/2014.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.09.2019

DELIVERED ON : 17.09.2019

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl. R.C. No.500 of 2014

1.M/s.Mariappa Gounder and
Company Pushpasekaran,
Vivekananda Sago Factory,
represented by its Partner,
M.Pushpasekaran.

2.M.Pushpasekaran ... Revision Petitioners

Vs.

S.M.Sivakumar ... Respondent

Criminal Revision Case filed under Section 397 r/w. 401 of Cr.P.C., to set aside the judgment dated 26.03.2014, passed in C.A.No.71/2013 by the learned Principal Sessions Judge, Salem confirming the judgment of conviction and sentence passed in S.T.C.No.219/2009 dated 18.07.2013 by the learned Judicial Magistrate No.5, Salem and acquit the petitioners.

For Petitioners : M/s.Jayasri Baskar

For Respondent : M/s.C.Sangamithirai

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O R D E R

This Criminal Revision has been filed to set aside the judgment dated 26.03.2014 passed in C.A.No.71 of 2013 by the learned Principal Sessions Judge, Salem, confirming the judgment of conviction and sentence passed in S.T.C.No.219 of 2009 dated 18.07.2013 by the learned Judicial Magistrate No.5, Salem and acquit the petitioners.

2.For the sake of convenience, the petitioners and the respondent will be referred to as "accused 1 and 2" and "complainant", respectively.

3. It is the case of the complainant that the first accused is a partnership firm called "M/s.Mariappa Gounder and Company Puspasekaran, Vivekananda Sago Factory and the second accused is "M.Puspasekaran, Partner" in the 1st accused firm. On account of the dealings that the complainant had with the accused, a sum of Rs.85,000/- was due to the former from the latter; the accused gave a cheque dated 31.07.2008 (Ex.P.1) for a sum of Rs.85,000/-; when the complainant presented the cheque, the same was returned unpaid on 15.12.2008 with the endorsement "Insufficient Funds" vide Bank memo (Ex.P.2); the complainant issued a statutory demand notice dated 24.12.2008 (Ex.P.3) which returned "Unserved"; since the accused refused to accept the said notice vide Ex.P4, the complainant initiated a prosecution in STC.No.219 of 2009 before the Judicial Magistrate No.5, Salem, against the accused under Section 138 of the Negotiable Instruments Act, 1881 (for short "The NI Act").

4.The complainant was examined as P.W.1, Rajasekaran (Branch Manager of the complainant's bank) was examined as P.W.2, and Ramesh, Branch Manager of the accused's bank was examined as P.W.3. Exs.P.1 to P.8 were marked on the side of the complainant.

5. When the accused was questioned under Section 313 Cr.P.C on the incriminating circumstances appearing against him, he denied the same. No witness was examined on behalf of the accused, but, in the cross-examination of the complainant, four cheques that were returned by the complainant to the accused were marked as Ex.D.1 series.

6.After considering the evidence on record and on hearing either side, the trial Court, by judgment and order dated 18.07.2013 in STC.No.219 of 2009, convicted the accused and sentenced him to undergo six months simple imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo two months simple imprisonment. The appeal in C.A.No.71 of 2013 that was filed thereagainst by the accused was dismissed by the Court of Session, Salem on 26.03.2014.

7.Challenging the concurrent findings of the two Courts below, the accused has preferred the instant Criminal Revision under Section 397 read with 401 Cr.P.C.

8.Heard the learned counsel for the accused and the learned counsel for the complainant.

9.Before adverting to the rival submissions, it may be necessary to state here that, a three Judge Bench of the Supreme Court, in Girish Kumar Suneja Vs. CBI [(2017) 14 SCC 809], has held that revisional jurisdiction is a discretionary one and it can be exercised only if the High Court finds that there is an error apparent on the face of the record. For better appreciation, the relevant portion of the said judgment is extracted hereunder :

> "27. Our conclusion on this subject is that while the appellants might have an entitlement (not a right) to file a revision petition in the High Court but that entitlement can be taken away and in any event, the High Court is under no obligation to entertain a revision petition - such a petition can be rejected at the threshold. If the High Court is inclined to accept the revision petition it can do so only against a final order or an intermediate order, namely, an order which if set aside would result in the culmination of the proceedings. As we see it, there appear to be only two such eventualities of a revisable order and in any case only one such eventuality is before us. Consequently the result of paragraph 10 of the order passed by this Court is that the entitlement of the appellants to file a revision petition in the High Court is taken away and thereby the High Court is deprived of exercising its extraordinary discretionary power available under Section 397 Cr.P.C."

10. While exercising revisional powers under Section 397 read with 401 Cr.P.C., this Court is required to find out, if there is any illegality or impropriety in the findings of the trial Court and the appellate Court warranting interference and it is not open to this Court to exercise the revisional power as a second appellate forum. In this context, it is profitable to allude to the following paragraphs in the judgment of the Supreme Court in State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand and Others, etc. [(2004)7 SCC 659]:

> "22.The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of

revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,

> "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".

It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.

(emphasis supplied)

23.On this aspect, it is sufficient to refer to and rely on the decision of this Court in Duli Chand v. Delhi Admn.[(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC p. 651, para 5)

> "The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse."

11. This legal principle has been reiterated very recently by the Supreme Court in Bir Singh Vs Mukesh Kumar [(2019) 4 SCC 197], wherein, the following question of law was formulated:

> "(i) whether a Revisional Court can, in exercise of its discretionary jurisdiction, interfere with an order of conviction in the absence of any jurisdictional error or error of law"

The answer of the Supreme Court to the aforesaid question is as under :

> "19.It is well settled that in exercise of revisional jurisdiction under Section 482 of the Criminal Procedure Code, the High Court does not, in the absence of perversity, upset concurrent factual findings. It is not for the Revisional Court to re-analyse and re-interpret the evidence on record.
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> 20.As held by this Court in Southern Sales & Services v. Sauermilch Design and Handels GmbH [(2008) 14 SCC 457], it is a well-established principle of law that the Revisional Court will not interfere even if a wrong order is passed by a court having jurisdiction, in the absence of a jurisdictional error. The answer to the first question is therefore, in the negative."

12.The learned counsel for the accused submitted that, in the complaint, the complainant has stated that there were business dealings with the accused and the liability of Rs.85,000/- was on account of such dealings, whereas, in the evidence, the complainant has stated that the accused had borrowed a sum of Rs.85,000/- and thus, there is a fundamental flaw in the case of the complainant. The learned counsel for the accused further submitted that the accused is suffering from cancer and hence, some leniency may be shown to him.

13. The accused could have easily settled the matter with the complainant, when the case was pending from 2008-2013 before the trial Court or before the Appellate Court or between 2014-2019 during the pendency of this case before this Court.

14.It is seen that the complainant was examined in chief on one date and was cross examined on another date. The cheque is of the year 2008 and the proceedings in the Court has been deliberately delayed by the accused.

15.A reading of the cross-examination of the complainant shows that the complainant was related to the accused and the complainant had nothing to do with the sago business that was being done by the accused. Even in the cross-examination, the complainant has correctly stated that, he gave the amount by cheque to the accused at the house in Raja Ganapathy Street, Salem. He has further stated that the accused was running a sago factory and that the accused was running his business in two names. He further admitted that he has filed another prosecution against the accused in S.T.C.No.219 of 2009 in respect of a cheque for Rs.85,000/-.

16.In the complaint, it is stated that "Out of the consequence of the dealings with the complainant, the accused incurred liability to the Complainant. That liability is to the tune of Rs.85,000/-". This does not mean that the complainant had business dealings with the accused in connection with sale and purchase of sago. On a careful scrutiny of the records of this case and the case in S.T.C.No.220 of 2009, it is seen that the accused is having two bank accounts, one in the name of "M/s.Krishna Sago Factory, Proprietor Pushpasekaran", from which account, he issued three cheques which is the subject matter of the prosecution in S.T.C.No.220 of 2009 and another in the name of "Mr.Mariyappa Gounder and Company, Partner Pushpasekaran", from which account, he has issued the cheque of Rs.85,000/-, which is the subject matter of the present prosecution in S.T.C.No.219 of 2009.

17.In the cross examination, four cheques that were given by the accused to the complainant were marked as Ex.D.1 series. The complainant has stated that the four cheques which were issued by the accused were dishonoured and when the accused asked him to return the cheques, he returned them and obtained fresh cheque from him. This only clearly shows that the cheques were not given as security by the accused. Had the accused given the impugned cheque as security, there was no reason for him to take back the four earlier cheques that were dishonoured and give the impugned cheque leaf in lieu of them. In fact, in the cross-examination, the complainant had stated that he has even filed a civil suit for recovery of money against the accused. When the accused has admitted the issuance of the impugned cheque, then, the burden is on him under Section 138 of the NI Act, to prove that it was not issued in discharge of any debt or liability. Of course, the accused can discharge this burden by preponderance of probability as held by the Supreme Court in Rangappa Vs Sri Mohan [2010 (4) CTC 118]. In this case, the accused has failed to discharge the said burden even by preponderance of probability. Therefore, this Court does not find any infirmity in the finding of facts arrived at by the two Courts below warranting interference.

18. In the result, this criminal revision stands dismissed as being devoid of merits and the judgments of conviction of the accused passed by the two Courts below are confirmed. However, the sentence of six months imprisonment imposed on the accused is reduced to three months simple imprisonment. The trial Court is directed to secure the accused and commit him to prison to undergo the sentence. It is always open to the parties to approach this Court and file

a petition under Section 147 of the NI Act for compounding the offence. However, it is made clear that the trial Court shall not delay the execution of the warrant on the ground that the parties are likely to compound the offence.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Sessions Judge, Salem.
2. The Judicial Magistrate No.5,Salem.
3. The Deputy Registrar (Criminal Side), High Court, Madras.

Note: Registry is directed to send back the original records to the respective Courts.

+1cc to M/s.Jayasri Baskar , Advocate SR.No. 80036

+1cc to M/s.C.Sangamithirai, Advocate SR.No.79539 (11/12/19)

Crl. R.C. 500 of 2014

ss

A.SK(05/11/2019)