BAIL SLIP

The Petitioner/accused namely J.Sayad Sameer was directed to be released on bail as per the order of this Court dated 10.01.2019 made in Crl.M.P.No.137 of 2019 in Crl.R.C.No.72 of 2017.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 15.07.2019

DELIVERED ON: 09.08.2019

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.R.C. No.72 of 2017 & Crl.M.P. Nos.790 & 792 of 2017

J. Sayad Sameer ... Petitioner

vs.

1 A. Riyaz Ahamed

2 State by the Public Prosecutor
Erode ... Respondents

Criminal Revision filed under Section 397 read with Section 401 Cr.P.C. seeking to set aside the judgment and order dated 23.11.2016 passed in Crl.A. No.25 of 2016 on the file of the I Additional District and Sessions Court, Erode confirming the judgment and order dated 12.02.2016 passed in S.T.C. No.454 of 2012 on the file of the Judicial Magistrate Court (Fast Track Court at Magisterial level-I), Erode.

For petitioner Mr. R. Vivekananthan

For R1 Mr. M. Guruprasad

ORDER

This criminal revision has been filed seeking to set aside the judgment and order dated 23.11.2016 passed in Crl.A. No.25 of 2016 on the file of the I Additional District and Sessions Court, Erode, confirming the judgment and order dated 12.02.2006 passed in S.T.C. No.454 of 2012 on the file of the Judicial Magistrate (Fast Track Court at Magisterial level-I), Erode.

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

3 It is the case of the complainant that on 07.04.2012, the accused borrowed a sum of Rs.4,70,000/- from him and issued a post-dated cheque dated 07.07.2012 drawn on ING Vysya Bank, Tiruppur for the said amount; when the complainant presented the cheque in his account with HDFC Bank, Gandhiji Road Branch, Erode, on 07.07.2012, it was returned unpaid on 10.07.2012 with the endorsement "account closed"; the complainant issued a statutory notice dated 23.07.2012 (Ex.P.3) to the accused, which was received by the accused on 27.12.2012; since the accused did not comply with the demand, the complainant initiated a prosecution in S.T.C. No.454 of 2012 before the Judicial Magistrate (Fast Track Court No.I), Erode under Section 138 of the NI Act against the accused.

4 On summons, the accused appeared and when questioned under Section 251 Cr.P.C., he denied the accusation.

5 To prove the case, the complainant examined himself as P.W.1 and marked the impugned cheque (Ex.P.1), bank return memo dated 10.07.2012 (Ex.P.2), legal notice dated 23.07.2012 (Ex.P.3), postal receipt dated 23.07.2012 (Ex.P.4) and postal acknowledgment card dated 25.07.2012 (Ex.P.5).

6 When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same and did not offer any explanation. On his side, Balamurugan, Branch Manager of the HDFC Bank, Gandhiji Road Branch, Erode, was examined as D.W.1 and the account statements of the complainant were marked as Exs.D.1 to D4.

7 After considering the evidence on record and hearing the learned counsel on either side, the Trial Court, vide judgment and order dated 12.02.2016 in S.T.C. No.454 of 2012, convicted the accused under Section 138 of the NI Act and sentenced him to undergo six months simple imprisonment and pay a fine of Rs.5,000/-, in default to undergo 15 days simple imprisonment.

8 Challenging the aforesaid conviction and sentence, the accused preferred Crl.A. No.25 of 2016 which has been dismissed by the I Additional District and Sessions Court, Erode on 23.11.2016, aggrieved by which, the accused has preferred the present revision before this Court under Section 397 read with 401 Cr.P.C.

9 Heard Mr. R. Vivekananthan, learned counsel for the accused and Mr. M. Guruprasad, learned counsel for the complainant.

10 Before adverting to the rival submissions, it may be necessary to state here that, while exercising revisional powers under Section 397 r/w 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.[1]:

> "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,
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> > "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)

1 (2004) 7 SCC 659

> "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 The learned counsel for the accused submitted that the complainant does not have the wherewithal to give Rs.4,70,000/- to the accused, as could be seen from his bank statement (Ex.D.2). This Court carefully perused the evidence of the complainant (P.W.1) and the documents (Exs.D.1 to D4). On a perusal of the bank statements of the complainant, it is seen that on 15.03.2012, a sum of Rs.1 lakh was available and on 19.05.2013 also, there was a sum of Rs.1 lakh in the account and there have been lot of transactions. That apart, the accused himself has suggested to the complainant in the cross-examination that the complainant had invested Rs.2.25 lakhs in the business of the accused which the complainant has admitted.

12 The learned counsel for the accused took this Court through the cross-examination of the complainant in page no.4 and submitted that the complainant has accepted the suggestion put to him that he does not have any money and that he had taken Rs.2.25 lakhs from his father and he has invested the said money in the business of the accused. This Court carefully perused the entire evidence of the complainant (P.W.1). A reading of the particular sentence relied upon by Mr. Vivenakanthan shows that it is a complex sentence with three suggestions and the last of the suggestions is relating to the investment made in the business of the accused. It is the case of the complainant that he has invested Rs.2.25 lakhs in the business of the accused in December 2011. Therefore, when he had stated "yes". it is difficult for this Court to consider that he has stated "yes" for the earlier two suggestions also. In fact, the complainant (P.W.1) has stated that he had invested a sum of Rs.2.25 lakhs in the business of the accused and on 08.02.2012, the accused has returned a sum of Rs.1.25 lakhs. This sum of Rs.1.25 lakhs is reflected in the account statement of the complainant. It is the case of the complainant that the subject loan transaction is different from the investment of Rs.2.25 lakhs that he had made in the business.

13 The accused has also set up a defence that a sum of Rs.1 lakh was returned to the complainant's father on 08.09.2012. With regard to this, the complainant has stated that he does not know about the transaction between the accused and his father. Ultimately, it has been suggested to the complainant that the impugned cheque was given as security and that he had filled up the blank cheque and had presented for clearance.

14 The learned counsel for the accused contended that the payee column and the amount column in the cheque have been written in different inks and as such, the complainant himself has filled up the blank cheque. In the cross-examination, the defence has confronted the complainant on this aspect by showing the impugned cheque and the complainant has stated that he does not find any difference in the ink. Even assuming for a moment that the complainant had filled up the name column of the cheque, that by itself, will not vitiate the instrument in the light of Section 20 of the NI Act. The accused has not denied his signature in the impugned cheque. In fact, the accused has not even replied to the statutory notice (Ex.P.3) that was issued by the complainant nor has he given any satisfactory explanation as to how the impugned cheque came into the hands of the complainant and as to why he (accused) closed the account. Though as held by the Supreme Court in Rangappa vs. Sri Mohan[2], the accused can discharge the burden under Section 139 of the NI Act by preponderance of probability, yet, no fruitful attempt has been made by the accused in this regard.

15 In view of the foregoing discussion, this Court does not find any infirmity in the findings of the Courts below in convicting the accused of the offence under Section 138 of the NI Act.

16 Now, coming to the question of sentence, Mr.R.Vivekananthan, learned counsel for the accused submitted that the accused has deposited a sum of Rs.4,70,000/-, being the cheque amount, before the Trial Court in compliance with the order passed by this Court, while suspending the sentence. He further submitted that the accused does not have any other financial resources to pay more to the complainant.

17 It is seen that the Trial Court has sentenced the accused to undergo six months simple imprisonment and imposed a

2 (2010) 11 SCC 441

fine of Rs.5,000/-, in default to undergo 15 days simple imprisonment and there is no order passed with regard to compensation. The complainant has also not filed any cross-appeal, challenging the sentence aspect. However, Mr.Guruprasad, learned counsel for the complainant strongly objected to the reduction of sentence and submitted that the transaction was of the year 2012 and that the complainant had to undergo the ordeal of prolonged litigation.

18 If the sentence is confirmed as it is, no financial benefit will accrue to the complainant, because, the Trial Court has not awarded any compensation. In such perspective of the matter, interests of justice will be served, if the sentence of six months simple imprisonment is set aside and the accused is directed to pay a sum of Rs.25,000/- as compensation, apart from the sum of Rs.4,70,000/- that has been deposited by him.

In the result, this criminal revision is partly allowed. Connected Crl.M.Ps. are closed. The conviction of the accused under Section 138 of the NI Act, stands confirmed. The sentence of fine of Rs.5,000/-, in default to undergo 15 days simple imprisonment is also confirmed. The sentence of six months simple imprisonment is set aside. The sum of Rs.4,70,000/- that has been deposited by the accused in the Trial Court, is ordered to be paid as compensation to the complainant and the complainant will be entitled to withdraw the same. The accused shall deposit an additional compensation of Rs.25,000/- within a period of four weeks from the date of receipt of a copy of this order, failing which, he will be required to undergo one month simple imprisonment. On such deposit, the complainant will be entitled to withdraw the sum of Rs.25,000/- from the Trial Court.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

cad

To

1 The I Additional District and Sessions Judge
Erode

2 - do - through The Principal Sessions Judge, Erode.

3 The Judicial Magistrate,
(Fast Track Court at Magisterial level-I)
Erode

4 - do - through The Chief Judicial Magistrate, Erode.

5 The Public Prosecutor
High Court of Madras
Chennai 600 104

+1 cc to M/s.M.Guruprasad, Advocate, S.R.No.68571

+1 cc to M/s.R.Vivekanandan, Advocate, S.R.No.68425

Crl.R.C. No.72 of 2017

BP(CO)
SSM(10/09/2019)