

Bail Slip

The Appellant/Accused namely T.P.Nallusamy was directed to be released on bail as per order of this court dated 09/10/2018 made in Crl.Mp.No.13518/2018 in Crl.R.C.No.1159/2018.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 27.08.2019
PRONOUNCED ON : 06.09.2019
CORAM
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.R.C.No.1159 of 2018

T.P.Nallusamy

.. Petitioner

Vs

M/s.India Cements Investments
Services (P) Ltd.,
"Status Quo", No.38, Sterling Road,
Chennai 600 034.

.. Respondent

Criminal Revision preferred under Section 397 r/w 401 Cr.P.C. to set aside the judgment and order dated 11.08.2018 passed by the Sessions Judge, Fast Track Mahila Court, Namakkal in C.A.No.36 of 2018 confirming the judgment and order dated 22.03.2018 passed by the Judicial Magistrate No.I, Namakkal in S.T.C.No.823 of 2010.

For Petitioner : Mr.G.Murugendran
For Respondent : Mr.M.Aravind Subramaniam

O R D E R

This Criminal Revision Petition has been preferred to set aside the judgment and order dated 11.08.2018 passed by the Sessions Judge, Fast Track Mahila Court, Namakkal in C.A.No.36 of 2018 confirming the judgment and order dated 22.03.2018 passed by the Judicial Magistrate No.I, Namakkal in S.T.C.No.823 of 2010.

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, they are in the derivative market segment with Securities and Exchange Board of India (SEBI) registration and a trading member of the National

Stock Exchange of India Ltd. (NSE); the accused entered into a Member and Constituent Agreement dated 18.12.2006 (Ex.P2), under which, shares were purchased and sold on his behalf, for which, the accused issued 3 cheques bearing Nos.177366 dated 17.01.2008 for Rs.2,50,000/- (Ex.P5), 177367 dated 18.01.2008 for Rs.2,50,000/- (Ex.P6) and 177368 dated 21.01.2008 for Rs.5,00,000/- (Ex.P7) [totally Rs.10,00,000/-]; when the cheques were presented for clearance, they were returned unpaid with the remarks "insufficient funds" vide memos Ex.P8, Ex.P9 and Ex.P10 respectively; they issued a statutory demand notice dated 20.02.2008 (Ex.P11), which was received by the accused vide acknowledgment card (Ex.P12); since the accused did not pay the amount, they initiated a prosecution in S.T.C.No.823 of 2010 under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "NI Act"), in which, the trial Court convicted the accused on 27.12.2012 and sentenced him to undergo 1 year simple imprisonment and pay Rs.10,00,000/- being the cheque amount as compensation to the complainant, in default to undergo 3 months simple imprisonment. The appeal in C.A.No.1 of 2013 filed by the accused was allowed by the Additional District and Sessions Court, Namakkal on 08.11.2013 and the accused was acquitted. Challenging the acquittal, the complainant preferred Crl.A.No.13 of 2014 before this Court, in which, the order of acquittal was set aside and the matter was remanded for fresh disposal with liberty to both parties to adduce further evidence. On remand, further evidence was adduced by the complainant.

4. On behalf of the complainant, two witnesses viz. Nagaraj (P.W.1) and Dhanraj (P.W.2) were examined and 15 exhibits were marked. 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 nor any document marked.

5. After considering the evidence on record and hearing either side, the learned Judicial Magistrate, Namakkal, by judgment and order dated 22.03.2018 in S.T.C.No.823 of 2010 convicted the accused of the offence under Section 138 of the NI Act and sentenced him to undergo simple imprisonment for 1 year and pay a fine of Rs.10,000/-, in default to undergo further simple imprisonment for 3 months. The appeal in C.A.No.36 of 2018 filed by the accused has been dismissed by the Sessions Court, Fast Track Mahila Court, Namakkal on 11.08.2018. Challenging the concurrent findings of the two Courts below, the accused is before this Court. While granting suspension of sentence and bail on 09.10.2018, this Court has directed the accused to deposit Rs.3,00,000/- before the trial Court and the same has been deposited.

6. Heard Mr.G.Murugendran, learned counsel for the accused

and Mr.W.M.Abdul Majeed, learned counsel for the complainant.

7. Before advertng 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 the revisional jurisdiction is a discretionary one and 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 ruling 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."

7.1. 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 Kuldeep 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."

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

"(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.

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."

8. Mr.Murugendran, learned counsel for the accused took this Court through the contract notes (Ex.P14 Series) and submitted that it contains an arbitration clause and therefore, the prosecution of the accused under Section 138 of the NI Act was illegal. The existence of an arbitration clause in the agreement is not an impediment at all for a prosecution under Section 138 of the NI Act in respect of a dishonoured cheque. An agreement between the parties cannot have the effect of nullifying a statutory penal provision.

9. Mr.Murugendran, learned counsel took this Court through the evidence of P.W.1, especially the cross-examination portion and submitted that the 3 cheques were given only as security and not towards any debt. He drew the attention of this Court that in the 3 cheques, the name of the drawee has not been handwritten but, the seal of M/s.India Cements Investments Services (P) Ltd. has been affixed, which only shows that the cheques were given only for security purpose.

10. This Court is unable to countenance this submission. The accused did not deny his signatures and the writings in the cheques. Nor the accused denied his signature in the Member and Constituent Agreement (Ex.P13). The accused was taken as a member and was assigned a separate account No.FN0021 and trading in shares was done by the complainant on his behalf as could be seen from the contract notes (Ex.P14 Series). In such share trading contracts, it is a business practice for the constituent to obtain cheques as security from the member, in order to avert

the possibility of the member terminating the agreement without making payments for the investments made by the constituent on his behalf. That apart, Section 20 of the NI Act permits the person other than the drawer to fill up the columns in a cheque.

11. Mr.G.Murugendran, learned counsel placed strong reliance on the judgment of the Andhra Pradesh High Court in M/s.Spring Fields Financial Services Ltd. Vs. State of A.P. and Another (2006 CriLJ 2090), in support of the contention that SEBI regulations alone will apply and the contract is void under Section 23 of the Contract Act. The facts of the case in Spring Fields (supra) are totally different from that of the case at hand. In that case, the complainant was a financial company and had provided finances to the accused to an extent of Rs.31,50,000/-, towards which, the accused is said to have issued 3 post-dated cheques. That apart, the accused company had issued 3,15,000 equity shares worth Rs.10/- each to the complainant by way of additional security and the accused company had agreed to buy back those equity shares. In those facts, the Andhra Pradesh High Court had held that the contract therein was void under Section 23 of the Contract Act. Whereas, in this case, the contract (Ex.P13) shows that the complainant had traded shares on behalf of the accused and in that trading, the accused was liable to pay Rs.15,47,440/- as could be seen from the answers given by P.W.1 in the cross-examination.

12. Learned counsel for the accused further submitted that there was no proper demand in the legal notice dated 20.02.2008 (Ex.P11). This Court perused the legal notice (Ex.P11) and found that the notice contains the details of the bills and the cheques. This Court does not find any infirmity in the legal notice. Hence, the submission of the learned counsel for the accused that the cheques were issued for a legally enforceable debt, cannot be accepted. Except making suggestions to P.W.1 that the cheques were not issued only towards security, the accused had failed to discharge the burden under Section 139 of the NI Act, even by preponderance of probability as laid down by the Supreme Court in Rangappa Vs Sri Mohan [2010 (4) CTC 118]. When the accused was questioned under Section 313 Cr.P.C., he has merely denied the incriminating materials against him and has not given any explanation as to the circumstances under which the cheques issued by him were dishonoured.

In the result, this revision petition is partly allowed. The conviction of the accused under Section 138 of the NI Act is confirmed, but the substantive sentence is reduced from 1 year simple imprisonment to 8 months simple imprisonment, since the accused has deposited Rs.3,00,000/- in the trial Court. The trial Court is directed to disburse the amount deposited by the

accused to the complainant as compensation. The trial Court is directed to secure the accused to undergo the remaining period of sentence, if any. Registry is directed to send the original records to the trial Court and the appellate Court forthwith.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Sessions Judge,
Fast Track Mahila Court, Namakkal.

2.The Judicial Magistrate No.I,
Namakkal.

3.Do Thro The Chief Judicial Magistrate,
Namakkal.

Copy to:

The Section Officer,
Criminal Section,
High Court, Madras.(To send the Original records to the trial
court and the appellate court forthwith)

+1cc to Mr.G.Murugendran, Advocate sr.77125

+1cc to Mr.M.Aravind Subramaniam, Advocate sr.77300

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CRL.R.C.No.1159 of 2018

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