

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 30.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.177 of 2003

M/s.Sree Subha Jayam Chits & Finances,
rep by its Power of Attorney Agent
S.Kumar, S/o.D.Srinivasan,
No.441, Gandhi Road,
Kanchipuram.

... Revision Petitioner

Vs.

E.Jell Sudhakar Jabaraj

... Respondent

Prayer: This Criminal Revision has been preferred against the judgment dated 28.11.2002 in C.C.No.442 of 1998 on the file of the Court of Judicial Magistrate No.I, Kancheepuram.

For Appellant : Mr.M.Deivanandan for M/s. G.R. Swaminathan
For Respondent : Mr.K.M.Balaji

ORDER

This Revision has been preferred by the accused against the judgment in C.C.No.442 of 1998 on the file of the Judicial Magistrate No.I, Kancheepuram. A private complaint was preferred by the complainant under Section 200 of Cr.P.C., for an offence under Section 138 of the Negotiable Instruments Act against the accused.

2. The short facts in the complaint relevant for the purpose of deciding this revision are as follows:-

The accused had received Rs.25,000/-, Rs.15,000/-, Rs.15,000/-, Rs.30,000/-, Rs.61,960/- respectively on 18.4.1995, 17.7.1995, 11.8.1995, 25.1.1996 and 31.3.1996 as hand loan from the complainant. To discharge the above said loan the accused had drawn two cheques one for Rs.15,000/- dated 6.6.1998 and another

for Rs.85,000/- dated 15.6.1998 in Indian Bank, BOT, Theradi, Kancheepuram. When those cheques were deposited by the complainant for encashment on 6.10.1998 the same were returned with an endorsement that account closed. Thereafter the complainant issued an advocate notice dated 12.10.1998 to the accused as required under law. In spite of the said notice the accused has not chosen to pay the amount. Hence the complaint.

3. The learned Judicial Magistrate has taken the complaint on file and issued summons for appearance of the accused. On appearance of the accused copies under Section 207 of Cr.P.C., were furnished to the accused and when the offence was explained to the accused, he pleaded not guilty. On the side of the complainant P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.18 were marked.

4. P.w.1 is the complainant, who would depose that the accused had borrowed Rs.25,000/- on 18.4.1995, Rs.15,000/- on 17.7.1995, Rs.15,000/- on 11.8.1995, Rs.30,000/- on 25.1.1996 and Rs.61,960/- on 31.3.1998, totaling Rs.1,49,960/- and in partial discharge of the said loan, the accused had drawn two cheques one for Rs.15,000/- dated 6.6.1998 another for Rs.85,000/- dated 15.6.1998 and those cheques were presented in the City Union Bank for collection, on 6.10.1998 they were returned with an endorsement as 'account closed'. Ex.P.1 is the registered certificate of the complainant's firm. Ex.P.2 is the partnership deed and Ex.P.3 is the power of attorney in favour of the complainant. Ex.P.4 is the dishonoured cheque for Rs.85,000/- and Ex.P.5 is the another dishonoured cheque for Rs.15,000/-. Ex.P.6 is the memo issued by the bank. Ex.P.7 & P.8 are the memos issued by City Union Bank. Ex.P.9 is the copy of the notice. Under Ex.P.10 & P.11 the accused had received the original of Ex.P.9-notice. Ex.P.12 is the reply notice. Ex.P.13 is the promissory note executed by the accused for Rs.25,000/- on 18.4.1995. Ex.P.14 is the promissory note executed by the accused for Rs.15,000/- on 17.7.1995. Ex.P.15 is the promissory note executed by the accused for Rs.15,000/- on 11.8.1996. Ex.P.16 is the promissory note executed by the accused for Rs.30,000/- on 25.1.1996. Ex.P.17 is the promissory note executed by the accused for Rs.61,960/- in favour of the complainant.

5. P.w.2 is an officer of the City Union Bank. He would depose that Ex.P.4 & Ex.P.5, cheques, were presented in their bank on 6.10.1995 for collection and those cheques were drawn on Indian Bank in original and those cheques were returned with an endorsement that account closed and under Ex.P.7 & P.8 the factum of dishonour of the cheques was informed to the complainant.

6. P.W.3 is the clerk of Indian Bank, who would depose that the accused is having a saving bank account in their branch and his

account number is 4095 and cheques Ex.P.4 & P.5 were issued by the accused and they were forwarded to Indian Bank for collection through City Union Bank and that on the date of receipt of the cheque the accused had closed his account and on the date of closure of the account there was only a sum of Rs.3,618/- alone was the balance at credit of the accused's account. Ex.P.6 is the memo under which the cheques were returned from the Indian Bank to City Union Bank. Ex.P.18 is the statement of account relating to the savings bank Account of the accused.

7. When incriminating circumstances were put to the accused, he denied his complicity with the crime. After going through the oral and documentary evidence the learned trial judge has held that the offence under Section 138 of the Negotiable Instruments Act has been made out against the accused and accordingly the learned trial judge convicted the accused and sentenced to pay a fine of Rs.1000/- under each count with default sentence and also directed the accused to pay compensation of Rs.42,500/- towards the cheque issued for Rs.85,000/- with default sentence and Rs.7,500/- towards the cheque issued for Rs.15,000/- with default sentence, (total compensation Rs.50,000/-) and a fine of Rs.2000/-. Aggrieved by the findings of the learned trial judge, the accused has preferred this revision.

8. When this revision was taken up for hearing the learned counsel for the revision petitioner submits that he will confine his argument in respect of sentence alone and not on merits. The learned counsel would contend that the learned trial Judge has imposed a fine of Rs.1000/- each under section 138 of NI Act for two counts and also awarded a compensation which is illegal and not permissible under law. The said point has been covered under the ratio decidendi of Apex Court of India in 2004(2) SCC 235 [Goa Plast (P) Ltd., Vs. Choci Ursula D'Souza]. The said case also arose for an offence under Section 138 & 139 of the Negotiable Instruments Act and in that case both the trial Court as well as High Court have acquitted the accused, but the honourable Apex Court have found the accused guilty under Section 138 of the Negotiable Instruments Act on the basis of the evidence available before the Court and convicted the accused and sentenced to pay a sum of Rs.80,000/- (twice the amount of the cheque) by way of compensation to the complainant without any other sentence. In 2004 (11) SCC 398 (Subhash Vs. State of Rajasthan and another), the trial Court had convicted the accused for an offence under Section 138 of the Negotiable Instruments Act and sentenced to undergo one year SI imprisonment and to pay a fine of Rs.10,212/-. In Appeal the substantive sentence of imprisonment has been reduced to 4 months while the amount of fine has been maintained. In appeal before the Honohourable Apex Court, the Honourable Apex Court has held that there cannot be a sentence of fine and also compensation

and ultimately the fine amount was converted into compensation. The exact observation of the Honohourable Apex Court in that case runs as follows:-

"Considering all the facts and circumstances of the case and specially the fact that earlier also the appellant had tried to make payment to the respondent by tending a bank draft but the same could not be encashed on account of the date of encashment having expired and there was some controversy which centred around the same, the appeal is partly allowed. Though the conviction of the appellant is maintained but the sentence of imprisonment is reduced to the period already undergone. The amount of fine is enhanced to Rs.15,318/- out of which the amount of compensation payable to the complainant shall be Rs.14,106/-. The amount already deposited by the appellant shall be adjusted against the amount now directed to be paid under this order."

In 2004(13) SCC 795 (Sivasuriyan Vs. Thangavelu), the trial Court sentenced the accused to undergo 6 months RI and a fine of Rs.5000/- for an offence under Section 138 of the Negotiable Instruments Act. On appeal the Additional Sessions Judge upheld the conviction but modified the sentence to that of till raising of the Court but confirmed the fine. Against the said order of the Additional Sessions judge, the complainant moved in revision and the High Court while confirming the sentence imposed by the first appellate Court further directed the accused to pay a compensation of Rs.1 lakh under Section 357 of Cr.P.C.,. Against the said order the accused has preferred an appeal before Honourable Apex Court, wherein it has been held as follows:-

"The learned counsel for the respondent complainant, on the other hand, submitted that in view of the nature of acusation in question in the facts and circumstances, the Court was justified in entering into the sufficiency of the sentence and directing award of compensation.

In view of the submissions made, the only question that arises for consideration is whether the Court can direct payment of compensation in exercise of power under Sub-section (3) of Section 357 in a case where fine already forms a part of the sentence. Apart from Sub-section (3) of Section 357 there is no other provision under the Code whereunder the court can exercise such power:

"357(3)- When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified

in the order of the person who has suffered any loss or injury by reason of the fact for which the accused person has been so sentenced."

On a plain reading of the aforesaid provision, it is crystal clear that the power can be exercised only when the court imposes sentence by which fine does not form a part. In the case in hand, a court having sentenced to imprisonment, as also fine, the power under sub-section (3) of Section 357 could not have been exercised. In that view of the matter, the impugned direction of the High Court directing payment of compensation to the tune of Rs.1 lakh by the appellant is set aside."

So from the above said ratios sentenced to pay fine coupled with compensation cannot be awarded. The accused can be convicted and sentenced under Section 138 of the Negotiable Instruments Act to undergo imprisonment and to pay a fine or both, but when the court exercises the power under Section 357(3) of Cr.P.c., then there cannot be a fine and also compensation. Under such circumstances, I am of the view that the sentence imposed by the trial court requires modification. In the interest of justice the accused can be directed to pay a compensation of Rs.2 lakhs (twice the amount of two cheques) to the complainant under section 357(3) of Cr.P.C., instead to pay a fine of Rs.1000/- under each count under Section 138 of the Negotiable Instruments Act and also compensation of Rs.42,500/- and Rs.7,500/-. Point is answered accordingly.

9. In the result, the revision is dismissed but with the following modification in the sentence. The accused is convicted and sentenced under Section 138 of the Negotiable Instruments Act to pay a compensation of Rs.2 lakhs (twice the amount of the cheques) to the complainant instead of fine and compensation awarded by the trial Court. Time for payment is one month from this date.

सत्यमेव जयते

Sd/-

Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,

1. The Judicial Magistrate No.I, Kancheepuram

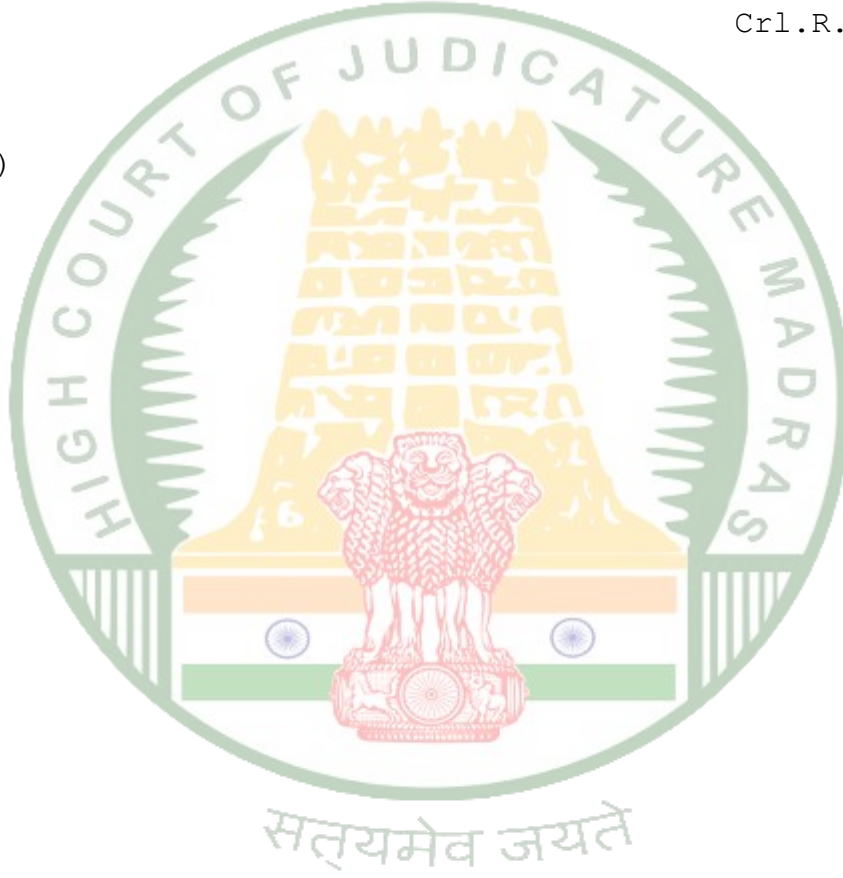
2. do Thro The Chief Judicial Magistrate
Chingleput.

1 cc to Mr.K.M.Balaji, Advocate, SR. 20830

1 cc to MR.G.R. Swaminathan, Advocate, Sr. 20450

CrI.R.C.No.177 of 2003

SSV (CO)
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