

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.Rev.P. 666/2007**

% Date of reserve : 01.04.2009  
Date of decision: 09.04.2009.

Col. S.S. Chaudhary ...Petitioner  
*Through:* Mr.Prag Chawla, Advocate

*Versus*

State and Anr. ...Respondents  
*Through:* Mr.Peeush Kulshreshtha, Advocate  
for respondent No.2

**WITH**

+ Crl.Rev.P.596/2007

Col. Avtar Singh ...Petitioner  
*Through:* Mr.Peeush Kulshreshtha, Advocate

*Versus*

Col. S.S.Chaudhary ...Respondent  
*Through:* Mr.S.S. Chillar, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE MOOL CHAND GARG**

1. Whether the Reporters of local papers Yes  
may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be Yes  
reported in the Digest?

**MOOL CHAND GARG, J.**

1. On a complaint C.C. 343/1 filed under Section 138 of the Negotiable Instruments Act by Col. S.S. Choudhary (complainant) petitioner in Crl.Rev.P.666/2007, the Magistrate vide order dated 15.05.2005 held the accused Avtar Singh (petitioner in Crl.Rev.P.596/2007) guilty and directed him to undergo SI for one

year and to pay double the amount of cheque towards compensation i.e. Rs.6,95,000/-, as the dishonoured cheque was for Rs.3,50,000/-. This order was challenged before the learned Additional Sessions Judge who while upholding the conviction modified the sentence by converting the SI to RI for one year but also ordered that no compensation shall be paid by the accused. The precise reason given for the same was that during the pendency of these proceedings the parties entered into a settlement by which, the accused paid a cheque of Rs. 5 lakhs to the complainant as a compromise but the said cheque was also dishonoured. The complainant also filed a civil suit for the recovery of Rs. 5 lakhs based upon the dishonoured cheque which suit has been decreed in his favour but according to the complainant no payment has been received so far.

2. The accused, Col.Avtar Singh, is questioning the order of the Additional Sessions Judge in upholding the conviction; whereas in other revision the complainant, is aggrieved on account of modification of the sentence by not granting compensation as ordered by the Magistrate vide order dated 19.05.2005.

3. Briefly stating the case against the accused, Col. Avtar Singh, is that he was a friend of complainant and had taken a friendly loan in the sum of Rs. 5 lakh from the complainant in October, 1996 for a period of six months. After the expiry of the period, the complainant requested the accused to return the loan and in part discharge of the said liability, the accused issued a cheque in question dated 12.6.1998 for a sum of Rs. 3.5 lakhs drawn on

Punjab National Bank, Chandigarh in favour of the complainant. The said cheque on presentation was dishonoured on the ground of insufficiency of funds. Thereafter, the complainant sent a legal notice dated 13.8.1998 by registered post and/or receipt and the same was returned back unserved with a report "not met" on 17.9.2000, 18.9.2000 and 19.9.2000. The legal notice was also sent to the residential and official address of the accused through UPC but the amount of dishonoured cheque was not paid. On these accusations, the complaint was filed and after pre-summoning evidence, the accused was summoned. A notice under Section 251 Cr.P.C. was framed to which the accused pleaded not guilty.

4. In order to prove its case, the complainant examined himself as CW-1. He examined CW-2 S.K. Garg the official from Canara Bank which is the bank of complainant. Statement of the accused under Section 313 Cr.P.C. was also recorded and the accused examined himself as DW-1 and testified, that complainant requested the accused for advancing a loan as a help of Rs. 15,00,000/- to start his work at Delhi being known to him being together in NDA. Although he shown his inability to pay such a huge amount, however, he issued a cheque of Rs. 3.5 lakhs as a loan to the complainant and not to discharge any debt or liability of the complainant. Accused further testified that it was agreed that the cheque would be presented after confirmation. However, the complainant became dishonest and without confirmation presented the cheque, without serving a legal notice upon him because from July, 1998 to November, 1998, he was in Orissa with his wife. The

accused also examined DW-2 Suresh Pandey. He testified that on 12.6.1998 when he and Hafiz were sitting at the office of the accused, complainant had come and stated that he needed Rs. 15 lacs urgently, the accused had told him that he cannot give this amount, however, he can give three/three and a half lacs and that he had to go Orissa. Thereafter, the complainant told that he may give the cheque right now. The accused gave the cheque and also his address of Orissa and told him that he should contact him at Orissa address. The witness stated that at the time when he left the job of accused, one lady Neeru was working at his office during March, 1995 to 30.6.1998. When he was working with the accused no one else was in the employment of the accused. He admitted that he is not a summoned witness. The witness stated that he does not have any document to show that he was in employment of accused during March, 1995 to 30<sup>th</sup> June, 1998. After hearing the argument, the trial court convicted the accused under Section 138 of the Negotiable Instruments Act as aforesaid.

5. Against the aforesaid order, the accused filed an appeal before the Additional Sessions Judge being Criminal Appeal No. 41/05, who after hearing the parties, vide impugned order dated 23.8.2007 upheld the judgment of the learned Metropolitan Magistrate regarding conviction of the accused under Section 138 of the Negotiable Instruments Act. Regarding sentence, he ordered that out of the compensation amount of Rs.7,00,000/-, Rs.5000/- will be deposited as fine in the Court. He further ordered that since the complainant has filed a civil suit for recovery of Rs. 5 lakhs on the

basis of cheque issued by the accused, which had reached the final stages, he is not inclined to award any compensation to the complainant. However regarding sentence, he opined that the conduct of the accused is such that no leniency can be shown to him. The offence under Section 138 of the Negotiable Instruments Act is a summary trial. However, the accused adopted all types of dilatory tactics and the trial became extremely exasperating for the complainant. Due to this reason the trial took seven long years to complete. Therefore, he did not reduce the sentence. However, the simple imprisonment of one year was modified to the rigorous imprisonment for one year.

6. The basic issue raised by both the parties is as to whether the order of the Addl. Sessions Judge in altering the sentence awarded to the accused by the Magistrate is justified keeping in view the powers vested in the Appellate Court under Section 386(b)(iii) of Cr.P.C. At this juncture, it would be appropriate to take note of the provisions contained under Section 386 of Cr.P.C. which reads as under:

**386. Powers of the Appellate Court.**

After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) In an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) In an appeal from a conviction-

(i) Reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate Court or committed for trial, or

(ii) Alter the finding, maintaining the sentence, or  
(iii) With or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;  
(c) In an appeal for enhancement of sentence-  
(i) Reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court competent to try the offence,- or  
(ii) Alter the finding maintaining the sentence, or  
(iii) With or without altering the finding, after the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;  
(d) In an appeal from any other order, alter or reverse such order;  
(3) Make any amendment or any consequential or incidental order that may be just or proper.

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence, which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

7. Relying upon the provision of Section 386(b)(iii) while the accused has submitted that enhancement of his S.I. to R.I. for 1 year was beyond the powers of Appellate Court, the complainant on the other hand submits that there is no justification in having altered the punishment with regard to payment of compensation in lieu of the dishonoured cheque which order is normally required to be passed in a case of dishonor of the cheque so that the complainant is compensated out of the money so recovered.

8. It is submitted that in this case even though subsequently a cheque was given by the complainant of Rs. 5 lakh which is also the basis of a civil dispute, the said cheque was also dishonoured and even if it is accepted that there is any compromise arrived at between the parties the said compromise was not implemented by the parties inasmuch as the cheque delivered by the complainant

later has been honoured on presentation. Admittedly, the cheque amount of the dishonored cheque has not been paid. It is also submitted that even the decree which has been granted in his favour in the Civil Court is still unexecuted and, therefore, it is submitted that the order of the Addl. District Judge to that extent be modified because there is no justification of the said order in having altered the punishment awarded to the complainant in the facts of this case.

9. Having gone through the record I find that except for making a flimsy story that the cheque in question was not to be presented by the petitioner without prior confirmation nothing has been placed on record by the accused to show that he ever wrote any letter to the complainant or send any message by way of a telegram or otherwise asking the complainant not to present the cheque. Even if it is assumed for the sake of reference that the accused was not willing for the complainant to present the cheque to his bankers for encashment his wish alone would not justify non-presentation of the said cheque within due date because once a cheque is issued unless there is anything on the record to the contrary, there is a presumption that the cheque had been issued in discharge of a legally recoverable debt and once the said cheque is presented as per the scheme of Negotiable Instruments Act the drawer is required to honour the said cheque on presentation.

10. In the present case there was no such eventuality which might permit the Trial Court to have acquitted the accused in the facts of this case and, therefore, the Trial Court rightly convicted the

accused.

11. In so far as the sentence part is concerned in an offence under Section 138 of N.I. Act, the concerned Court can not only send the accused to jail by awarding him punishment up to 2 years which may either be S.I. or R.I. and can also award compensation equal to twice the amount of the cheque. This provision is made with a view to enable the Court concerned to ensure that the amount of the cheque is recovered from the accused and some money out of that can be given to the complainant as compensation in discharge of the liability of the cheque which was dishonoured.

12. Similarly, because there was a compromise between the parties on the basis of which the accused gave a cheque of Rs. 5 lakh in lieu of the cheque of Rs. 3.5 lakh but the said cheque was also not honoured the accused cannot take benefit of his own wrong. If the cheque would have been honoured then probably even this complaint would have had a different colour although because any payment after the statutory period does not exonerate the accused from the offence which is committed under Section 138 N.I. Act. However, in the present case neither the accused has paid the original cheque amount within the time prescribed nor has honoured the cheque as a compromise. Thus, it does not lie in his mouth to say that there were circumstances which rightly enabled the Trial Court to reverse the sentence in the manner as it has been done.

13. Taking into consideration all these facts I do not find any justification in the order passed by the Addl. Sessions Judge in

altering the sentence awarded to the accused in a manner that instead of simple imprisonment he enhanced the same to Rigorous imprisonment for 1 year and simply reversed the order to pay compensation without any justified reasons.

14. Accordingly, the Revision Petition filed by the petitioner (complainant) bearing No. 666/2007 is allowed while Revision Petition No. 596/2007 filed by the accused is dismissed with the observation, "that the sentence awarded by the Adcxdl. Sessions Judge in the appeal filed by the accused is modified and the sentence awarded to the accused by the Trial Court is maintained." Both the petitions are disposed of with the aforesaid directions. The accused Col.Avtar Singh will surrender before the Trial Court within one week to undergo the sentence so awarded including payment of compensation for which in the alternative he will also undergo S.I. to the tune of one year as ordered by the Trial Court. Till then his bail bond shall remain in operation, but thereafter if he fails to surrender, his bail bond would stand forfeited. The trial Court would then take appropriate steps to ensure surrender of Col.Avtar Singh so as to ensure that he undergoes the sentence.

**MOOL CHAND GARG, J.**

APRIL 09, 2009