



BAIL SLIP

The Petitioner/Accused namely M/s.Karrthekai Trading Company, Rep. by its Proprietor K.Sengodan, Age 60, Male, S/o.Kalianna Gounder was released on Bail as per Order dated 12/04/2017 made in CrI.M.P.No.5215 of 2017 in CrI.R.C.No.594 of 2017 on the file of this Hon'ble Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 09.06.2022	PRONOUNCED ON 16.06.2022
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CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CRIMINAL REVISION CASE NO.594 OF 2017

M/s.Karrthekai Trading Company,
Rep. by its Proprietor K.Sengodan,
S/o.Kalianna Gounder,
No.27-B, V.B.School Road,
Thindal, Erode District.

... Petitioner/Accused
in CrI.R.C.No.594 of 2017

/Versus/

S.Natarajan,
S/o.Subramanian Gounder,
No.3, J.S.Nagar,
Amala School Road,
Gopichettipalayam Taluk,
Erode District.

... Respondent/Complainant
in CrI.R.C.No.594 of 2017

PRAYER IN CR.R.C.NO.594 OF 2017:-

Criminal Revision Case is filed under Section 397 r/w 401 of Cr.P.C., to set aside the judgment and conviction dated 24.03.2017 made in C.A.No.31 of 2016 on the file of the III Additional District and Sessions Court, Gobichettipalayam confirming the judgment dated 28.01.2016 made in C.C.No.214 of 2007 on the file of Judicial Magistrate No.I, Gobi.



For Petitioner : Mr.D.Selvaraju
For Mr.C.S.Saravanan

For Respondent : Mr.Ma.P.Thangavel

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O R D E R

The revision petition is filed against the concurrent findings of the Courts below. The subject matter of the revision is the cheque dated 09.04.2007 issued for Rs.9,00,000/- by the revision petitioner, in favour of the respondent. According to the respondent, the cheque was given by the revision petitioner to discharge the loan. On presentation, the cheque was returned for "insufficiency of fund", hence after serving statutory notice, a complaint filed under Section 138 of Negotiable Instruments Act, 1881.

2. To prove the case, the complainant/S.Natarajan (P.W.1) and Ranganathan (P.W.2), Postal Inspector were examined. In support of the complainant, 6 exhibits were marked.

3. On behalf of the petitioner/accused, two witnesses were examined and 11 exhibits were marked.

4. The Trial Court held the accused guilty and sentenced him to undergo one year S.I and to pay fine of Rs.5,000/- in default one month S.I.

5. Aggrieved by that, the accused preferred appeal before the III Additional District and Sessions Court, Gopichettipalayam.

6. The Appellate Court, after re-appreciation of evidence confirmed the findings of the Trial Court and dismissed the appeal. While dismissing the appeal, the Trial Court in addition awarded compensation of Rs.9,00,000/- being the value of the cheque amount.

7. Aggrieved by the concurrent findings of the Courts below, the present revision is filed on the ground that, the Courts below failed to take note of the fact that the statutory notice was not served to the accused. The Courts below failed to take note of the fact that the complainant, in his chief examination has stated that, Rs.9,00,000/- was borrowed by the revision petitioner on 09.04.2007. Whereas, the cheque is dated much prior to the said date i.e., 02.05.2007. This sole fact destroys the entire case of the complainant. The said discrepancy cannot be reconciled by any other evidence. Therefore, when the transaction itself is much later to the date of cheque, the



Courts below ought to have believed the version of the accused that the complainant herein has misused the cheque given by the petitioner to one S.Nagarajan, Advocate who is the colleague of the complainant, having joint office. The self contradictions of the complainant P.W.1, in his evidence, regarding filling up of blank cheque will prove that cheque was not issued to him for any legally enforceable debt. But, the unfilled cheque handed over to the colleague of the petitioner, filled and misused to extract money.

8. The Learned counsel appearing for the petitioner/accused submit that, there is no privity of contract between petitioner/accused and respondent/complainant. The petitioner herein had earlier transaction only with one S.Nagarajan, colleague of the respondent/complainant. The respondent had no wherewithal to advance loan of Rs.9,00,000/-. His bank transaction as spoken by D.W.1 would clearly indicate that, at relevant point of time, the respondent/complainant never had cash balance exceeding Rs.5,00,000/-.

9. The subject cheque was given to Nagarajan in respect of property, which he was holding the power of attorney. During the course of the said transaction, the blank cheque given to S.Nagarajan has been misused by his friend Natarajan/the complainant and same has been presented, filling the amount as Rs.9,00,000/-. The petitioner has proved that, the complainant had no wherewithal to advance loan of Rs.9,00,000/- and the complainant has failed to prove how Rs.9,00,000/- was given to the petitioner herein. Hence, the Courts below ought to have dismissed the complaint.

10. The two cheques obtained from the petitioner herein by Nagarajan has been handed over to Natarajan. He, in-turn has filled up one blank cheque in his name for Rs.9,00,000/- was presented and the complaint in C.C.No.214 of 2007 on bouncing. The other blank cheques was filed in the name of A.R.Sundar, who is none other than the brother-in-law of Natarajan and the complaint in C.C.No.411 of 2007 filed through A.R.Sundar for a sum of Rs.6,00,000/-. Both these cheques were not supported by any legally enforceable debt. Though same has been well proved and burden of initial presumption was discharged by the accused persons, the Courts below erred in holding the petitioner guilty of offence under Section 138 of Negotiable Instruments Act.

11. The Learned Counsel for the revision petitioner would emphatically argue that, the petitioner herein who is a practising Advocate has abused the process of law by initiating criminal complaint under Section 138 of Negotiable Instruments Act, 1881, even without proper service of the statutory notice. Apart from lack of privity of contract, there is no evidence to



complainant. Promising him that, the said money will be repaid by the petitioner within a period of three weeks. For the said purpose, a post-dated cheque was also handed over to the complainant as security. When the cheque dated 02.05.2007 was presented for collection on 09.05.2007, same was returned on 12.05.2007 with an endorsement "insufficient of funds". Statutory notice dated 29.05.2007 was issued to the petitioner/accused, who received it on 30.05.2007 but failed to reply. Hence, the complaint.

17. To prove the complaint, the respondent/S.Natarajan has mounted the witness box and examined himself as P.W.1. Since service of notice was denied and questioned by the petitioner/accused, he summoned P.W.2/ Ranganathan, Postal Inspector and examined him. Based on the records, P.W.2 has spoken about the delivery of the notice to the accused on 30.05.2007.

18. Regarding wherewithal to advance Rs.9,00,000/-, the evidence of the complainant accepted by the Courts below that, he had withdrawn Rs.5,00,000/- from the bank account shortly before advancing loan to the petitioner and from the savings of his wife Rs.4,00,000/- was paid to the petitioner. Though doubt raised by the Learned Counsel for the petitioner regarding this portion of evidence, the Courts below, on facts have held that, the petitioner had wherewithal to advance loan of Rs.9,00,000/-.

19. The Learned Counsel appearing for the petitioner would rely upon the defence document, particularly Ex.D.8 dated 14.07.1999 entered between the petitioner/accused as a power agent of one Subbanna Gounder and Nagarajan S/o.Vadivel contended that, this cheque was issued by the petitioner/accused only to Nagarajan, in connection with the transaction referred in Ex.D.8.

20. The Courts below have rejected the said defence since there is no corroborative evidence to believe the said document. Both trial Court as well as the Appellate Court thus had found him guilty.

21. This Court, on perusing the records find that the grounds raised in the revision petitioner does not disclose any perversity or non-application of mind except awarding the cheque amount as compensation when the complainant has not preferred any appeal seeking enhancement of punishment.

22. Point for consideration:- Whether in the appeal preferred by the accused the Appellate Court can enhance the punishment by awarding compensation which the trial Court has conspicuously omitted to award and the complainant had not preferred any appeal seeking compensation?



23. Though Negotiable Instrument Act empowers the Court in case the accused found guilty to award compensation twice the amount of the cheque. When the trial Court has consciously not awarded compensation in lieu of fine and consciously imposed fine of Rs.5,000/- only and one year S.I. Awarding compensation in the appeal filed by the accused will tantamount to enhancement of punishment.

24. Section 138 of Negotiable Instruments Act, 1881, reads as below:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account:-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to [two] years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months* from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of



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the cheque within fifteen days of the receipt of the said notice.

Explanation.—For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.

25. Thus, the Act provides for imposing fine to an extend of twice the cheque amount. The compensation can be paid from out of the fine by applying Section 357 of the Cr.P.C., which reads as below:-

“357. Order to pay compensation.—

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made



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before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(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 to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

26. Sub Section (1) of Section 357 of Cr.P.C which empowers the Court to order part or whole of the fine amount pay to the person who sustained loss and Sub-Section (4) of Section 357 of Cr.P.C., specifically say thus power may be exercised also by the Appellate Court and Court of revision, such exercise of power by the Appellate Court subject to Section 386(b)(iii) of Cr.P.C only.

27. Therefore, the compensation from out of the fine can be ordered from the fine amount which forms part of sentence. In this case, the Trial Court has imposed fine of Rs.5,000/- only in the appeal by the accused persons. The appellate Court presumably exercising its power under Section 357(4) of Cr.P.C, ordered compensation without altering the nature or extent of sentence while exercising the power under Section 357(4) of Cr.P.C, the appellate Court has failed to take note of its limits particularly Section 386 (b)(iii) of Cr.P.C which reads as under:-

386. Powers of the Appellate Court:-

(b). in an appeal from a conviction-

(i).....

(ii).....



(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.

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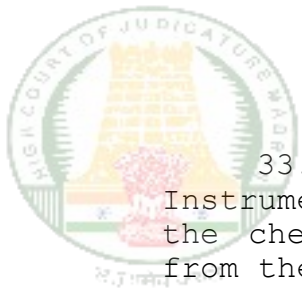
28. In this case, the Appellate Court despite bar to enhance the sentence, had imposed compensation of Rs.9,00,000/- without altering the nature or the extent of the sentence. This part of the appellate Court order is beyond its power and therefore perverse.

29. The Learned Counsel appearing for the respondent rely upon the judgment of the Hon'ble Supreme Court in Kalamani Tex and another -v- P.Balasubramanian reported in (2021) 5 SCC 283 and submitted that the Hon'ble Supreme Court has held, in an appeal preferred by the accused compensation can also be ordered while confirming the conviction. He further submitted that, the Appellate Court, in the case in hand, rightly awarded compensation in the appeal preferred by the accused.

30. On reading the Kalamani Tex judgment cited supra, this Court finds that the said judgment is in fact contrary to what the Learned Counsel for the respondent pleaded. The facts of the case in hand, the trial Court has held the petitioner guilty of offence under Section 138 of Negotiable Instruments Act, 1881 and sentenced him to undergo one year simple imprisonment and to pay fine of Rs.5,000/- in default one month simple imprisonment.

31. On Appeal filed by the accused, the Appellate Court confirmed the sentence of one year simple imprisonment and fine of Rs.5,000/-. In addition ordered compensation of Rs.9,00,000/- being the cheque amount.

32. Kalamani Tex and another cited supra is an appeal by the accused, the Hon'ble Supreme Court while considering the plea of the respondent seeking compensation had categorically held that, by not preferring appeal, the claim of compensation stands impliedly overturned. However, in the said case, since the accused has already deposited the cheque amount, the Hon'ble Supreme Court has concluded that, in the peculiar facts and circumstances of the case, since the accused/appellant has voluntarily deposited the cheque amount. Pending appeal, take a lenient view altering the order of the High Court, sentencing him to undergo three months simple imprisonment and fine of Rs.5,000/-. It modified the order of the High Court and directed the appellant shall not required to undergo the awarded sentence since the cheque amount deposited and same is treated as compensation.



33. Examine the wordings of Section 138 of Negotiable Instrument Act, no doubt fine can be imposed twice the amount of the cheque. In exercise of power under Section 357 of Cr.P.C from the fine amount, Courts can order to pay compensation.

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34. However, when such power is exercised by the Appellate Court or Court of Revision, the said power shall be subject to the limitation prescribed under Section 386(b)(iii) of Cr.P.C. In other words, no enhancement of sentence permissible under law in the appeal preferred by the accused.

35. In this case, while the Trial Court has consciously imposed fine of Rs.5,000/- and no compensation ordered, in the appeal by the accused, no power vested on the Appellate Court to enhance the sentence ordering compensation in the absence of appeal by the complainant. The compensation is not an independent component under Section 138 of Negotiable Instruments Act which is a special Act. It should be part of the fine amount and fine is part of sentence. It is a trite principle of law that, in appeal preferred by the accused person sentence cannot be enhanced. Therefore, the order of the Appellate Court perverse, contrary to law, hence liable to be set aside.

36. Insofar as the sentence of one year simple imprisonment and fine of Rs.5,000/- is concerned, taking note of the fact that, the transaction alleged to have been taken in the year 2007. The petitioner herein had become financially poor, lost his business and struck with poverty. Taking cue from the wisdom of Justice V.R Krishna Iyer in Jolly George Varghese and other -vs- Bank of Cochin reported in (1980) 2 SCC 360, the period of sentence imposed on the accused i.e., one year simple imprisonment is modified to six months simple imprisonment with fine of Rs.5,000/- in default one month simple imprisonment.

37. Accordingly, the Criminal Revision Case No.594 of 2017 is partly allowed. The Bail bond stands cancelled. The petitioner is directed to surrender before the trial Court to undergo the remaining period of sentence as modified. The period of imprisonment already undergone by the accused shall be set off under Section 428 of Cr.P.C.

Sd/-

Assistant Registrar(CS VII)

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Sub Assistant Registrar

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To

1. The III Additional District
and Sessions Judge,
Gobichettipalayam.
2. The Judicial Magistrate No.1,
Gobichettipalayam.
3. The Chief Judicial Magistrate,
Erode.

+1cc to Mr.C.S.Saravanan, Advocate, S.R.No.36680
+1cc to Mr.Ma.P.Thangavel, Advocate, S.R.No.36860

CRL.R.C.NO.594 OF 2017

SR(CO)
PBS/24/06/2022