

THE HON'BLE Dr. JUSTICE G. RADHA RANI

CRIMINAL REVISION CASE No.1900 OF 2015

ORDER:

This criminal revision case is preferred by the petitioner/respondent/accused aggrieved by the order dated 30-6-2015 in Criminal Revision Petition No.446 of 2012 on the file of the Additional Metropolitan Sessions Judge for trial of Communal Offence Cases cum VII Additional Metropolitan Sessions Judge, Hyderabad, in enhancing the sentence i.e. raising the fine amount from Rs.10,000/- to Rs.9,00,000/- and in default to suffer Simple Imprisonment for 3 months.

2. The case of the revision petitioner - accused in brief was that the 1st respondent filed a private complaint against him for the offence under Section 138 of the Negotiable Instruments Act (for short 'NI Act') alleging that the accused approached the complainant for a hand loan of Rs.9,00,000/- on 15-12-2007 and the complainant advanced the said amount, the accused executed an undertaking letter promising to repay the money within 3 months, but failed to repay the said amount and dodged the matter on one pretext or other. On repeated demands the accused issued a cheque bearing no 186962 dated 25-11-2009 for Rs.9,00,000/- drawn on Dena Bank, Saroor Nagar branch, Hyderabad towards discharge of legally enforceable debt. The cheque was returned unpaid with a memo for the reason of "funds insufficient" in the account of accused. Thereafter, the complainant

issued statutory notice and filed the complaint under Section 138 of the NI Act. After recording the sworn statement of the complainant, the VIII Additional Chief Metropolitan Magistrate took cognizance of the case and issued process. Subsequently, the case was transferred to the XV Additional Judge cum XIX Additional Chief Metropolitan Magistrate, Hyderabad, numbered as CC No. 134 of 2011 and tried by him. After considering the evidence on record, the trial court convicted the accused and sentenced him to undergo Simple Imprisonment for a period of one year and to pay fine of Rs.10,000/-, in default of payment of fine, to undergo Simple Imprisonment for three (3) months for the offence under Section 138 of the NI Act. Challenging the conviction, after payment of fine amount, the accused preferred an appeal under Section 374 Cr.P.C. The 1st respondent/complainant filed a revision petition vide Crl.R.C. No.466 of 2012 questioning the inadequacy of the sentence. The learned Additional Metropolitan Sessions Judge dismissed the appeal and allowed the revision by enhancing the fine amount from Rs.10,000/- to Rs.9,00,000/-, in default to suffer simple imprisonment for three months while maintaining the Simple Imprisonment for a period of one year. Out of the fine amount collected, awarded Rs.8,90,000/- to the complainant towards compensation under Section 357 Cr.P.C.

3. Aggrieved by the enhancement of fine amount, the petitioner/accused preferred this revision case contending that the learned Sessions Judge failed to examine that the revision filed by the complainant for enhancement of sentence and fine was improper and

was not maintainable procedurally. The proper procedure was to file an appeal under Section 382 read with 372 proviso and the appellate Court was empowered to deal with the appeal under Section 386 (c) Cr.P.C., the Session Judge erred in enhancing the fine/compensation and imposing default sentence. The Session Judge failed to consider that under NI Act, there was no mandatory provision to award compensation to the complainant or to pay compensation from the collected fine amount, the Sessions Judge failed to examine the language of Section 357 Cr.P.C. that imposition of fine apart from the punishment of imprisonment was in the discretion of the Court and the order for payment of whole and part of fine recovered was also in the discretion of the Court. As the order to pay compensation was not mandatory, the word “may” was used. Therefore, there was no defect or illegality procedurally in the judgment of the trial Court. The learned Sessions Judge erred in interfering with the discretionary power of the trial Court by way of revision, revision was not maintainable against the discretionary order and prayed to set aside the order dated 30.06.2015 in Crl.R.P. No.466 of 2012 on the file of the Additional Metropolitan Sessions Judge.

4. Heard the learned counsel for the revision petitioner/accused and the learned counsel for the 1st respondent.

5. Now the point for consideration before this Court is *whether* a revision is maintainable in the factual circumstances of the case and whether there is any illegality in the judgment of the learned

Additional Metropolitan Sessions Judge in Crl.R.P.No.466 of 2012 in enhancing the fine/compensation and imposing default imprisonment?

6. The contention of the learned counsel for the revision petitioner/accused was that the revision petition was not maintainable and proper procedure to be adopted by 1st respondent/complainant was to prefer an appeal under Section 382 read with 372 proviso, if aggrieved by the inadequacy of the punishment. Hence, it is considered necessary to extract the provisions under Section 382 and Section 372 Cr.P.C. Section 382 Cr.P.C. deals with the form of appeal. It only says as to how an appeal is to be presented. It reads as under:

“382. Petition of appeal: Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against.”

It does not deal with the right of appeal available to the parties.

Section 372 Cr.P.C. reads as:

“372. No appeal to lie unless otherwise provided.—No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.”

This proviso was inserted by Cr.P.C. (Amendment) Act, 2008

(5 of 2009), with effect from 31.12.2009.

7. Right of appeal is a statutory right. Statutory right means it must be conferred by statute and unless it provides there won't be any right of appeal. The Hon'ble Apex Court in **M/s.Super Cassettes Industries Limited v. State of Uttar Pradesh and another**¹ held that it is well known that right of appeal is not a natural or inherent right. It cannot be assumed to exist unless expressly provided by the Statute, remedy of appeal must be legitimately traceable to the statutory provisions.

8. From the wordings of the proviso to Section 372 Cr.P.C. a question arises as to whether the complainant in a case under Section 138 of NI Act can be considered as a victim. Only if he is considered as a victim, then only he would be having a right to prefer an appeal.

9. A Division Bench of this Court in **Smt. P. Vijaya Laxmi v. Smt. S.P. Sravana and another**² has held that complainants under the Negotiable Instruments act, 1881 cannot come under the definition of 'victim'. The general remedy provided to victims under the proviso to Section 372 Cr.P.C. cannot be extended to them to file an appeal before the Sessions Court against an order of acquittal in a case arising out of a private complaint, by treating them therein as a 'victim' under Section 2 (wa) of the Code.

10. The Division Bench while answering the reference made by a single Judge whether the complaint in a case of offence punishable under Section 138 of NI Act was a victim as defined under Section 2

¹ 2009 (9) TMI 914

² 2018 (1) ALD CrI 370

(wa) of Cr.P.C. as amended by Act 5 of 2009 with effect from 31.12.2009 held that:

“Though there may be complainants in the cases arising out of private complaint where the accused were ‘charged’, unlike a complaint case arising under Section 138 of NI Act, they still cannot aspire to maintain an appeal against an order of acquittal in such a case under the proviso to Section 372 of the code “ A complaint is not a ‘victim’ within the meaning of Section 2 (wa) of the Code and would stand excluded therefrom by virtue of the fact that the accused in such a case is not subjected to a ‘charge’.”

11. Thus, the Division Bench of this Court made it clear that the complainant’s in the cases under Section 138 of the NI Act cannot be considered as victims and the general remedy provided to the victims under proviso to Section 372 Cr.P.C. cannot be extended to them.

12. Section 377 Cr.P.C empowers the State the right of appeal against inadequacy of sentence. But the right to file an appeal against inadequacy of sentence had not been provided or given to a private complainant. It is well settled law that when there is no provision for appeal, revision lies. Hence, the 1st respondent filed the revision petition under Section 397 Cr.P.C. and the learned Sessions Judge after appreciation of the material placed on record enhanced the sentence of fine amount from Rs.10,000/- to Rs.9,00,000/-. Hence, this Court does not find any procedural irregularity in entertaining the revision by the learned VII Additional Metropolitan Sessions Judge in Crl.R.P. No.466 of 2012.

13. In considering the aspect whether there is any illegality in the judgment of the Sessions Court in enhancing the fine

amount/compensation, it is considered necessary to extract Section 138 of the NI Act.

“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 provisions of this Act, be punished with imprisonment for a term which may be extended 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 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.

14. It is apparent from a bare reading of Section 138 of the NI Act, that a criminal court after convicting the accused is empowered to impose punishment of imprisonment for a term which may extend to two years or fine, which may extend to twice the amount of cheque

or both. The trial court was thus, given a discretion to impose a sentence of imprisonment or fine or both. In Section 138 of NI Act, the word “or” has been employed, which would mean, discretion has been conferred in the matter of sentencing the person convicted for the offence under Section 138 of NI Act. However, while exercising this discretion, the trial Court must be alive to the object of the enactment, particularly the object of engrafting the Section 138 of NI Act. The prime object of enacting Chapter XVII which was inserted in the NI Act by Act 66/1889 with effect from 1989 was to control or discourage the menace of cheque bouncing in the course of commercial transactions and to encourage the certainty of use of cheques and enhancing credibility of the instrument.

15. The Hon’ble Apex Court in **Damodar S.Prabhu v. Sayed Babalal**³, a three Judge Bench observed that:

“3. However, there are some larger issues which can be appropriately addressed in the context of the present case. It may be recalled that Chapter XVII comprising sections 138 to 142 was inserted into the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988). **The object of bringing Section 138 into the statute was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. It was to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficient arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.** If the cheque is dishonoured for insufficiency of funds in the drawer's account or if it exceeds the amount arranged to be paid from that account, the drawer is to be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the

³ 2010 (5) SCC 663

amount of the cheque, or with both. It may be noted that when the offence was inserted in the statute in 1988, it carried the provision for imprisonment up to one year, which was revised to two years following the amendment to the Act in 2002. It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques.

4. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a fine which may extent to twice the amount of the cheque' serves a compensatory purpose. What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions."

(emphasis supplied by this court)

16. The Hon'ble Apex Court further observed that unlike other forms of crime, the punishment for commission of offence under Section 138 of NI Act was not a means of retribution but was mere means to ensure payment of money and therefore in respect of offences of dishonour of cheques, it was the compensatory aspect of the remedy which should be given priority over the punitive aspect.

17. Thus, the criminal courts while convicting the accused under Section 138 of the NI Act cannot ignore the compensatory aspect of remedy and the compensatory aspect can be given due regard if the sentence imposed is at least commensurate to the amount of cheque, so that the fine once imposed can be appropriated towards payment of compensation to the complainant by having resort to Section 357 Cr.P.C. Hence, this Court does not find any illegality in enhancing the amount of fine from Rs.10,000/- to Rs.9,00,000/- for the sentence under Section 138 of NI Act, commensurate to the

cheque amount and directing the same to be appropriated towards payment of compensation to the complainant by having resort to Section 357 Cr.P.C.

18. The other question that would arise for consideration before this Court is whether a revision against a revision would lie. A reading of Section 397 Cr.P.C. would disclose that a power under revision is conferred both on the High Court and Sessions Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order passed by the courts below.

19. Earlier revision petition was preferred by the 1st respondent/complainant before the Sessions Court aggrieved by the judgment of the Magistrate Court in not awarding compensation under Section 357 (2) Cr.P.C. and questioning the inadequacy of sentence and fine amount imposed by the said court as the purpose of filing the complaint was not served. The present revision case is filed by the accused questioning the enhancement of fine amount and imposing default sentence by the Sessions Court. Hence, it is considered necessary to extract Section 397 Cr.P.C. It reads as under:

“397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction 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, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this subsection and of section 398.

(2) The powers of revision conferred by subsection (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.”

20. As seen from the above provision, a second revision is barred under Section 397 (3) Cr.P.C. But, the language of the provision would disclose the prohibition is confined to a second revision application by the same person, who filed a revision application before the Sessions Judge. The bar does not operate against the person who was the opposite party in the Sessions Court. As such, the present revision would not be a second revision by him. Therefore, the application filed by the petitioner/accused cannot be deemed to be a further application by the same person, who filed a revision before the Sessions Judge. Therefore, in the considered view of this Court, the revision filed by the petitioner/accused against the revision filed by the 1st respondent/complainant is maintainable.

21. In the result, the Criminal Revision Case is dismissed confirming the order dated 30.06.2015 in Criminal Revision Petition No.446 of 2012 on the file of the Additional Metropolitan Sessions Judge for trial of Communal Offence Cases-cum-VII Additional Metropolitan Sessions Judge, Hyderabad enhancing the fine amount

from Rs.10,000/- to Rs.9,00,000/-, and in default, to suffer simple imprisonment for three months and awarding compensation to the complainant from out of the fine amount under Section 357 Cr.P.C.

22. Miscellaneous petitions pending, if any, shall stand closed.

February 11, 2022
KTL

Dr. G. RADHA RANI, J