

CASE NO.:
Appeal (crl.) 1335 of 2005

PETITIONER:
P. Suresh Kumar

RESPONDENT:
R. Shankar

DATE OF JUDGMENT: 08/03/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The parties hereto were partners. The partnership business ran into rough weather. Appellant intended to initiate some criminal proceedings against the respondent. Allegedly, the bank account was to be operated jointly. Respondent alone as a partner, thus, could not have taken out any money from the bank. However, allegedly, he did so. According to the respondent, a compromise was entered into by and between the parties in a police station on the following terms:

"1) Both the firms accounts right from inception till date shall be finalized and the share of profits determined by an independent auditor, Mr. R. Kasi Viswanathan. His determination shall be final and binding on both the parties.

2) The above scrutiny and finalization shall be completed before 31.1.1996. Until such time, we shall not raise any dispute against each other.

3) Till such finalization, Mr. Shankar shall handover a cheque (cheque No. 551661 dated 31.1.96) for Rs. 7 lakhs to Mr. Suresh Kumar as security deposit.

4) If the share of profits for Mr. Suresh Kumar is more than 7 lakhs, he shall encash the cheque and shall also receive the balance amount from Shankar forthwith. If the share of profits is less than 7 lacs, Suresh Kumar shall return the said cheque and Shankar shall pay Suresh Kumar a draft for the amount of profits determined. If any profit is due to Shankar, Suresh Kumar shall pay the same to Shankar forthwith."

Pursuant thereto or in furtherance thereof, the respondent allegedly handed over a post dated cheque for a sum of Rs. 7,00,000/- to the appellant. As the said cheque was dishonoured on presentation, a complaint petition was filed by the appellant inter alia alleging:
"3\005Further the accounts in the Bank are joint accounts and the cheques can be drawn only by both of partners on any account and not by one partner.

4. The Complainant submits that the accused has taken some amounts from the Bank and the bills also encashed by him for his own gain without concern of complainant. Therefore the accused has agreed to pay the profits sharing of a sum of

Rs. 12 lacs towards the complainant. But he agreed to pay advance share of profit which he owes to the complainant till appropriate audit and accounting is made, the accused has given a sum of Rs. 7 lacs by cheque No. 551661 dated 31.1.1996 drawn of Syndicate Bank, Kodambakkam Branch as assured. The accused is to settle the entire due towards the complainant before 31.1.1996.

5. The complainant submits that the accused has not informed the complainant anything about the stop payment or requesting not to present the cheque. Therefore, in good faith the complainant has presented the cheque on 31.1.1996 through his Bankers Syndicate Bank, Kodambakkam Branch through his S.B. Account No. 10521. And the complainant has received an intimation from the Bankers that the payment stopped by the drawer and thus the cheque is dishonoured. The complainant has also verified whether the accused has sufficient funds in the Bank account on 31.1.96 but to his shock found that the accused was not having sufficient funds to honour the cheque on 31.1.96. Therefore the complainant has issued a lawyer's notice dt. 3.2.1996 to the accused stating that the dishonouring of the cheque and the accused caused complainant mental agony and demanded the cheque amount to be paid to the complainant within 15 days from the date of receipt of the notice. The accused has received the notice on 6.2.1996 but he has preferred no reply to the notice even after 15 days and he has not paid the cheque amount till date."

The learned Trial Judge, however, found the said defence of the respondent to be not acceptable. The learned Magistrate by a judgment and order dated 12.10.1998 imposed a fine of Rs. 7,05,000/- and directed that if the respondent fails to remit, he will undergo three months simple imprisonment. Out of the said amount, he was directed to pay a sum of Rs. 7,00,000/- by way of compensation and the remaining sum of Rs. 5000/- was to be credited to the Government.

An appeal thereagainst was filed by the respondent. The learned Additional Sessions Judge partially allowed the said appeal stating:

"22. In the result, this Criminal Appeal is partly allowed thereby the finding of conviction against the accused under Sec. 138 of Negotiable Instrument Act is confirmed and the sentence is modified to the effect that the appellant/ accused should pay a fine of Rs. 5,000/- (Rupees five thousand only) under Sec. 138 of Negotiable Instrument Act and in default to undergo three months simple imprisonment and the order of the learned Magistrate in awarding compensation is set aside. There is no order as to cost. The appellant/ accused will be entitled to get back the amount deposited by him less the fine amount, now imposed, and entitled to get back the bank guarantee and other security deeds filed by him in this case after the time for revision or appeal is over or after the revision or after if any preferred is over."

Appellant herein preferred a revision application before the High Court which was marked as R.C. No. 1213 of 2001 whereby and whereunder modification was made by the appellate court in relation to the quantum of fine.

Respondent filed a criminal revision against the said order which was marked as Criminal R.C. No. 713 of 2001. The High Court dismissed both the civil revisions confirming the conviction of the respondent under the provisions of the Act as also the order qua the question of the payment of fine.

Respondent herein has not approached this Court from the said order. Only Appellant has. By an order dated 6.10.2005, a 3-Judge Bench of this Court while granting leave directed:

"Notice shall issue to the respondent to show cause why the sentence be not enhanced and the sentence of fine be not substituted by order for imprisonment as also an order for payment of compensation under Section 357(3) of the Code of Criminal Procedure read with Section 138 of the Negotiable Instruments Act, returnable after four weeks."

It is not in dispute that the Negotiable Instruments Act (for short "the Act") was amended by the Negotiable Instruments (Amendment & Misc. Provisions) Act, 2002 which came into force with effect from 6.02.2003 in terms whereof the accused could also be imprisoned for a term which may extend to one year or with fine which may extend to twice the amount of the cheque or with both. The amended provision, however, is not applicable in the instant case.

Mr. Kailash Vasudev, learned senior counsel appearing on behalf of the appellant, would submit that the learned District Judge and the High Court committed a serious error in passing the impugned judgment insofar as they failed to take into consideration that the quantum of punishment should be commensurate with the gravity of the offence and having regard to the amendment in the Act which came into force on 6.02.2003, it is a fit case where the respondent should have been awarded substantial punishment.

Mr. V. Prabhakar, learned counsel appearing on behalf of the respondent, on the other hand, would submit that having regard to the fact that this Court had issued notice on enhancement of sentence; in terms of Section 377 of the Code of Criminal Procedure, the respondent would be entitled to contend that no case had been made out for recording a judgment of conviction by the courts below. According to the learned counsel, the defence of the respondent having regard to entering into a compromise by and between the parties hereto was wrongly not accepted by the courts below, as the same should have been considered by the courts below in the light of the averments made by the complainant in the complaint petition wherefrom it would be evident that :

- (i) the share of the profit in the partnership business was still to be ascertained;
- (ii) the cheque was issued in anticipation of the accounts to be audited by a named auditor;
- (iii) Only upon finalization of the accounts by the auditor, the debt or liability of the respondent could have been clearly ascertained so as to make him liable for payment of any amount pursuant thereto or in furtherance thereof.

In the instant case, it was urged, as the appellant himself in his complaint petition categorically stated that the actual amount of the liability of the respondent was yet to be ascertained, the courts concerned must be held to have committed a manifest error in recording a judgment of conviction.

It was further submitted that the appellate court and consequently, the High Court also committed a manifest error inasmuch as they failed to take into consideration that the burden of proof on the accused can be discharged by showing only preponderance of probabilities; the standard of proof not being the proof beyond all reasonable doubt. Our attention has further been drawn to the fact that although the learned Trial Judge had directed payment of compensation and fine of Rs. 7,05,000/-, the appellant had not filed any appeal thereagainst and in that view of the matter, the revision petition filed by it was not maintainable.

Section 138 of the Act is a special statute. It provides inter alia for imposition of fine which may extend to twice the amount of the cheque.

We, as at present advised, need not go into the question as to whether having regard to the provisions contained in Sub-section (2) of Section 29 of the Code of Criminal Procedure, the jurisdiction of the Magistrate would be to impose a fine for a sum of Rs. 5,000/- or not in view of the decisions of this Court in *Pankajbhai Nagjibhai Patel v. State of Gujarat* [(2001) 2 SCC 595] and *K. Bhaskaran v. Sankaran Vaidhyan Balan* [(1999) 7 SCC 510].

The question arising in this case, in our opinion, should be considered absolutely from a different angle.

Although the power of the court to impose a fine may or may not be limited, it is not in dispute that the power to award compensation is not. The purpose for which such compensation is to be granted to the complainant whether in terms of clause (b) of Sub-section 1 of Section 357 of the Code of Criminal Procedure or Sub-section (3) of Section 357 is not of much significance for our purpose, although there cannot be any doubt whatsoever that consideration for payment of compensation is somewhat different from payment of fine. [See *Rachhpal Singh v. State of Punjab* (2002) 6 SCC 462]

In *State of Punjab v. Gurmej Singh* [(2002) 6 SCC 663] it was stated:

"9. The next contention raised by the learned counsel for the appellant is that the surviving victim, namely, the daughter of Jagjit Singh may be awarded some compensation under Section 357(3) of the Code of Criminal Procedure. In support of his submission he has also referred to a decision of this Court in *Rachhpal Singh v. State of Punjab*. In the said case this Court allowed compensation under sub-section (3) of Section 357 CrPC to the victims but it would not be applicable in the present case since a sentence of fine has also been imposed. A reading of sub-section (3) of Section 357 would show that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part. The decision in *Rachhpal Singh* does not take any contrary view nor hold that compensation may be awarded over and above the sentence of fine. A perusal of sub-section (3) of Section 357 CrPC would make the position clear.

11. In the present case, sentence of fine has also been imposed, as indicated in the earlier part of this judgment. Out of the fine, a sum of Rs 1000 each had been ordered to be given to the three injured persons, namely, Dalip Singh, Amarjit Kaur and Gurmeet Kaur. The balance amount is to go to the legal heirs of Jagjit Singh. We had heard the learned counsel for both parties on this aspect. Learned counsel for the appellant submitted that Gurmeet Kaur lost both her parents as well as her brother in the incident and now she is alone and

would have become of marriageable age or may have to start some work of her own. She would need some money. In case she cannot be compensated, the amount of fine may be enhanced to some extent. Learned counsel for the respondent has, however, submitted that out of seven acres of land belonging to his father, the same has been divided into three equal shares and some of it is also under mortgage and he has got two daughters and a son and his wife. He has also submitted that whenever the respondent was released on parole he met Gurmeet Kaur and his wife also keeps on going to meet her. Their relations are normal and cordial. If that is so, nothing better can be thought of in the prevailing circumstances. However, we are not considering for awarding any compensation to Gurmeet Kaur under Section 357(3) CrPC but the amount of fine imposed, can in any case be reasonably enhanced."

Purpose of imposition of fine and/ or compensation, however, must be considered having regard to the relevant factors in mind as envisaged under Section 357 of the Code of Criminal Procedure.

We may notice that in *Sube Singh v. State of Haryana* [2006 (3) SCC 178], the law has been stated in the following terms :

"...The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."

The basic question, however, which arises for consideration before us is as to whether we, in the peculiar facts and circumstances of this case, can delve deep into the matter so as to find out the culpability of the respondent herein and pass a judgment of acquittal in his favour. We do not think that we should do so. Section 377 of the Code of Criminal Procedure has no application in the instant case. Respondent has not preferred any appeal. Even otherwise the complainant had categorically stated in his complaint petition that although his claim was for a sum of Rs. 12 lakhs which amount the respondent is said to have been withdrawn from the bank in contravention of the terms and conditions of the deed of partnership, he accepted his liability at least to the extent of Rs. 7,00,000/-. It appears from a plain reading of the complaint petition that the respondent had admitted his liability to the extent of Rs. 7,00,000/-. It was found as of fact to be so by the courts below. The said findings do not warrant any interference. The defence raised by the respondent to the effect that the parties had entered into a compromise in the police station and he had to sign a cheque under some threat or coercion had not been accepted by the courts below. There cannot be any doubt whatsoever that had the respondent been able to show that the cheque had been issued not in discharge of a debt but by way of a security pending determination of his liability by an auditor, the matter would have been different. In such an event, the court could have arrived at a finding that the cheque having been issued on the basis of an anticipated profit which by itself did not create any liability in present and the result of the audit might have gone either way, no case under Section 138 of the Act was made out. But, the same is not the case here.

The question which now arises for consideration is as to whether any case for awarding a substantial sentence has been made out. We do not think so. Grant of compensation, in our opinion, would subserve the

purpose.

Appellant may also file a suit for damages and/ or for other reliefs. We do not know what was found by the auditor upon scrutiny of the books of account of the partnership firm.

The relationship between the parties is not disputed.

Respondent has not been charged with any fraudulent action. He had a probable defence. Appellant furthermore had not preferred any appeal against the judgment of the learned Trial Judge for enhancement of the sentence. It may be that quantum of compensation has been altered to that of the fine but in effect and substance the same did not matter.

In our opinion, therefore, interest of justice would be subserved, if the respondent is hereby directed to pay a compensation of Rs.7,00,000/- in stead and place of a fine of Rs.5,000/-, as has been directed by the High Court. Thus, the appellant would be entitled to get the aforementioned sum of Rs.7,00,000/- by way of compensation.

This appeal is disposed of accordingly. Respondent should pay the amount of compensation within a period of eight weeks, if not already deposited, failing which steps may be taken for recovery thereof in accordance with law.