

**Premalatha Vs. Jacob**

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**Court :** Kerala

**Decided On :** Oct-04-2002

**Reported in :** III(2003)BC177

**Judge :** T.M. Hassan Pillai, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 386

**Appeal No. :** Crl. R.P. No. 150 of 1998

**Appellant :** Premalatha

**Respondent :** Jacob

**Advocate for Def. :** Joby Jacob Pulickekudy, Adv. and; Sujith Mathew Jose, Public Prosecutor

**Advocate for Pet/Ap. :** A.V.M. Salahudin, Adv.

**Judgement :**

ORDER

**T.M. Hassan Pillai, J.**

1. Concurrent findings on facts recorded by the Courts below (Judicial First Class Magistrate-1, Kozhikode in C.C. 838/93 and the learned Addl. Sessions Judge-II, Kozhikode Division in Crl.A. 59/1996) on proper appreciation of evidence are

sought to be assailed by filing this revision by the convicted accused. Learned counsel for the revision petitioner submitted fairly before me that in view of the settled position of law that this Court is loath to interfere with the concurrent findings on facts recorded by the Courts below on proper appreciation of evidence unless glaring feature which would otherwise tantamount to gross miscarriage of justice is brought to this Court's notice the revision petitioner is not challenging the findings based on trustworthy and cogent evidence led in support of his case by the complainant -1st respondent.

2. The trial court on proper appreciation of evidence convicted the revision petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 as amended (for short, the Act) and on appeal the appellate Court affirmed the conviction. Trial Magistrate, on conviction, ordered the revision petitioner to undergo imprisonment for six months and the learned Sessions Judge interfering with the sentence awarded altered the sentence to fine of Rs. 30,000/- with a default clause. Learned counsel submitted that illegality or irregularity has been committed by the learned Addl. Sessions Judge and he contended that while altering the sentence of imprisonment awarded by the trial Magistrate into one of fine of Rs. 30,000/-, Sessions Judge imposed a punishment higher than the maximum punishment that could have been imposed by the trial court. Counsel argued vehemently that the revision petitioner was tried by the Judicial First Class Magistrate-I, Kozhikode, who could not impose a fine exceeding Rs. 5,000/-, and therefore the learned Sessions Judge could not have imposed on the revision petitioner fine exceeding Rs. 5000/-. Counsel submitted that by imposing a fine of Rs. 30,000/- the learned Sessions Judge imposed a punishment higher than the maximum punishment (fine) that could have been imposed by the trial court.

3. There appears to be considerable force in the above contention urged vigorously before me. It is settled position of law that appellate court is not competent to impose a punishment higher than the maximum that could have been imposed by the trial court. An appeal court is a 'court of error', that is, a court established for correcting an error. If the court were to do something which is beyond the competence of the trying court, it could, not be said to be correcting an error of the trying court. The power of appellate court to pass a sentence must be

measured by the power of the Court from whose judgment an appeal has been brought before it. (See Jagat Bahadur v. State of M.P. (AIR 1966 SC 945).

4. If an accused person is found guilty of an offence under Section 138 of the Act, he can be punished with imprisonment 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. Supreme Court held in K. Bhaskaran v. Sankaran Vaidhyan Balan (1999 SCC (Crl.) 1287) that appellate court cannot obviate the jurisdictional limit prescribed in Section 386 of the Code, though the said provision confers power on the court of appeal to reverse an order of acquittal and find him guilty and pass sentence on him according to law. High Court, when it is the Court of appeal, has to conform to the 2nd proviso to Section 386 Cr.P.C. High Court, while convicting the accused in the same case could not impose a sentence of fine exceeding the said limit. The appellate court has to conform to the provisos to Section 386 of the Code, The 2nd proviso to Section 386 Cr.P.C. reads thus:

'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.'

Sub-section (2) of Section 29 Cr.P.C. contains a limitation for Judicial Magistrate of the First Class in the matter of imposing fine as a sentence or as a part of the sentence. Section 29(2) Cr.P.C. reads thus:

'29. Sentences which Magistrates may pass,-

(1) XXX XXX XXX

(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both.'

The Appellate Court (2nd Addl. Sessions Judge, Kozhikode) could not have imposed a fine exceeding Rs. 5,000 and by imposing a fine of Rs. 30,000/- the Sessions Judge imposed a punishment higher than the maximum punishment (fine exceeding Rs. 5,000/-) that could have been imposed by the trial court. It is to

be pointed out that if the appellate Court enhances the sentence of fine imposed altering the substantive sentence of imprisonment and fine awarded by the trial court, it may not amount to enhancement of the sentence, and in that case also the enhancement of fine should not exceed the fine which the trial court could have been imposed.

5. The amount of the cheque in question is Rs. 20,000/-. The Supreme Court in *Sunganthi Suresh Kumar v. Jagadeeshan*, 2002 AIR SCW 298, held that it should be the look out of the trial Magistrate that the sentence for the offence under Section 138 of the Act should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him lightheartedly. The very object of the enactment of the provisions like 138 of the Act would stand defeated if a flee bite sentence is imposed.

6. In view of the well settled legal position that the learned Sessions Judge could not have imposed on the revision petitioner fine higher than the fine that could have been imposed by the trial court for not defeating the very object of enactment of the provisions like 138 of the Act the matter is to be remanded to the appellate court for awarding proper sentence.

Hence, the revision is allowed in part and the matter is remitted to the learned Addl. Sessions Judge-II, Kozhikode for considering afresh the question of sentence to be imposed upon the revision petitioner.

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