

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRIMINAL REVISION NO. 583 OF 2012**

Smt. Meel Bai Age (Not mentioned in judgment) 50 years W/o
Jageshvar Prasad Kurre R/o Village Tifra, Tah. & Distt. Bilaspur
C.G.

---Applicant**Versus**

Rameshvar Prasad Chauhan S/o Baldeo Prasad Chauhan Age
40 years R/o Risda, Tah. Masturi, Distt. Bilaspur C.G.

----Non-applicant

For Applicant	:	Mr. Raj Kumar Gupta, Advocate
For Non-applicant	:	Ms. C.K. Navrang, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****18/09/2015**

1. The complainant/non-applicant Rasmeshvar Prasad Chauhan filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter called as 'N.I. Act'), stating *inter alia* that on 30/06/2009 and 15/12/2009 towards the existing liability, the applicant/accused- Smt. Meel Bai issued two cheques amounting to Rs.2,50,000/- to the complainant, which was dishonoured on account of insufficient fund in her account. After serving legal notice, when the amount was not repaid, the complaint was filed for commission of offence punishable under

Section 138 of the N.I. Act, in which, present applicant- Smt. Meel Bai abjured her guilt by pleading that she has falsely been implicated in the case and entered into defence.

2. In order to prove the offence, the complainant/non-applicant examined himself as PW-1 and brought five documents on record, whereas, the defence examined two witnesses and brought no document on record.

3. After considering contentions of the parties and evidence available on record, the Judicial Magistrate First Class, Bilaspur, C.G. by its judgment dated 24/03/2012, convicted the accused/applicant- Smt. Meel Bai for the offence punishable under Section 138 of the N.I. Act and sentenced her to undergo simple imprisonment for one year and also awarded compensation of Rs.2,50,000/- under Section 357(3) of the Cr.P.C. in default of payment of compensation amount to further undergo simple imprisonment for three months.

4. Feeling dissatisfied with the conviction for offence under Section 138 of the N.I. Act, the accused- Smt. Meel Bai preferred Criminal Appeal No. 100/2012 before the Court of Session. The Second Additional Session Judge, Bilaspur, C.G., by its judgment dated 23/08/2012 maintained the conviction under Section 138 of the N.I. Act finding no merit but reduced the jail sentence from simple imprisonment for one year to imprisonment till rising of the

Court and enhanced the compensation amount from Rs.2,50,000/- to Rs.2,75,000/- and further directed to pay the compensation amount within a period of one month, in default of payment of compensation amount to further undergo simple imprisonment for six months.

5. Invoking revisional jurisdiction by this Court under Section 397 read with Section 401 of the Cr.P.C. the applicant preferred instant criminal revision.

6. Mr. Raj Kumar Gupta, learned counsel appearing for the accused-Smt. Meel Bai would submit that conviction recorded and sentence awarded by both the Courts below are absolutely illegal in view of fact that there is no pre-existing liability on her part towards complainant- Rasmeshvar Prasad Chauhan and as such, the conviction recorded is bad & unsustainable in law and deserves to be set aside. He would further submit that sentence awarded is shockingly on higher side as the jail sentence is not mandatory in view of the language employed in Section 138 of the N.I. Act.

7. Ms. C.K. Navrang, learned counsel appearing for the complainant – Rasmeshvar Prasad Chauhan would submit that conviction recorded by the trial Magistrate as affirmed by the Appellate Court is well merited and does not call for any interference and the sentence awarded is also just, fair and

reasonable.

8. I have heard the learned counsel appearing for the parties and perused the judgment impugned including records of the case carefully.

9. Upon hearing both the counsel, following two questions arise for determination.

- (i) Whether the conviction of Smt. Meel Bai for offence under Section 138 of the N.I. Act is just and proper?
- (ii) Whether the punishment imposed upon the accused-Smt. Meel Bai by the Appellate Court is just and proper?

Answer to question No.1.

10. I shall first take up the plea of Mr. Gupta that there was no pre-existing liability against the complainant to make payment of Rs.2,50,000/- by cheque. It is admitted position on record that the applicant had purchased the land bearing Khasra No.624/132, area 470 sq. ft. situated at Devi Nagar, Bilaspur from the complainant for a consideration of Rs.3,00,000/- on 30/06/2009 and against that, she issued cheque on 30/06/2009 which was dishonoured due to insufficient fund and later on, she issued another cheque on 15/12/2009 and that cheque submitted for payment, which was also dishonoured due to insufficient fund, thereafter, notice was issued and complaint under Section 138 of the N.I. Act was filed.

11. Section 139 of the N.I. Act provides as under:-

“139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.”

12. The presumption mandated by Section 139 of the N.I. Act was considered by the Supreme Court in the matter of **Rangappa v. Sri Mohan**¹, it has been held that the presumption available under Section 139 of the N.I. Act includes presumption that there exists a legally enforceable debt or liability, though, such presumption is rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. Thus the initial presumption provided in aforesaid provision favours the complainant and accused can rebut the said presumption and discharge the reverse onus by adducing evidence. The aforesaid decision has been followed and reiterated by Their Lordships of Supreme Court in the matter of **S. Natarajan v. Sama Dharman & another**².

13. The Trial Magistrate has clearly recorded a finding that there was a legally enforceable liability of the applicant against purchase of land and in discharge of that, two cheques were issued to the complainant and that cheques were returned due to

¹ (2010) 11 SCC 441

² 2014 (9) SCALE 3

insufficient fund in the account of accused/applicant and the said finding of the trial Magistrate has been affirmed by the Appellate Court. The said finding recorded by Trial Magistrate and duly affirmed by Appellate Court is based on evidence available on the record and in which, I do not find any illegality and as such, the applicant has rightly been convicted by trial Court and the Appellate Court has not committed any illegality in affirming the same, this question is answered accordingly.

Answer to Question No.2

14. Section 138 of the N.I. Act provides as under:-

“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 honor the cheque or that it exceeds the amount arrange to be paid from that account by an agreement made with that banker, 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 extend to one year, 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 XVII 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 fifteen 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.”

15. By virtue of Section 138 of the N.I. Act, the Criminal Court after convicting the accused has to impose punishment of imprisonment, which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

16. In the matter of **State of Maharashtra v. Jugamander Lal**³ Their Lordships of the Supreme Court has held that, expression ‘shall be punishable for imprisonment and also for the fine’, means that the Court is bound to impose a sentence comprising both imprisonment and fine.

17. Furthermore, Their Lordships of the Supreme Court in the matter of **The Assistant Commissioner, Assessment-II, Bangalore and Others v. M/s. Velliappa Textiles Ltd. and another**⁴ has held as under :-

“35.....Where the legislature has granted discretion to the court in the matter of sentencing, it is open to the court to use its discretion. Where, however, the legislature, for reasons of policy, has done away with this discretion, it is not open to the court to impose only a part of the sentence prescribed by the legislature, for that would amount re-writing the provisions of the statute.”

³ AIR 1966 SC 940

⁴ 2003 (11) SCC 405

18. But, here in the instant case, in Section 138 of the N.I. Act the word “or” has been employed and discretion has been conferred to the Criminal Court sentencing the convicted person for offence under Section 138 of the N.I. Act, Thus, there is a discretion left with the Criminal Court either to sentence the accused with imprisonment or to punish the accused with the sentence of fine upon considering the facts and circumstances of the case.

19. In the matter of **Damodar S. Prabhu v. Sayed Babalal H.**⁵, Their Lordships of the Supreme Court while examining the object sought to be achieved by provisions of Section 138 of the N. I. Act and purpose underlying the punishment provided therein has held that Section 138 of the N.I. Act cases are meant to secure payment of money by holding as under:-

“17. Unlike that for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant’s interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.”

20. Very recently, in the matter of **Somnath Sarkar v. Utpal Basu Mallick and another**⁶, Their Lordships of the Supreme Court while considering the punishment to be imposed under

⁵ (2010) 5 SCC 663

⁶ (2013) 16 SCC 465

Section 138 of the N.I. Act have held in no uncertain term that under Section 138 of the N.I. Act, only fine sentence can be imposed by the Criminal Court and observed as under:-

“15.....Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. Inasmuch as the High Court did so, it committed no jurisdictional error.....”

21. Thus, from the provisions contained in Section 138 of the N.I. Act and going by the law laid down by Their Lordships of the Supreme Court in aforesaid judgments it is *quite vivid* that Criminal Court sentencing the accused for commission of offence under Section 138 of the N.I. Act is competent to impose sentence of fine only as imposition of jail sentence is not mandatory as it is discretion vested with the Criminal Court either to impose jail sentence or sentence of fine only depending on the facts and circumstances of particular case.

22. Now the question raised and to be considered in this revision is whether the trial Court as well as the Court of Session is justified in imposing compensation upon the applicant/accused under Section 357(3) of the Cr.P.C. In order to consider the said plea it would be appropriate to set out the provisions contained in the aforesaid provision:-

“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)-(d) ** ** **

(2) ** ** **

(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 Sessions 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.”

23. The law with regard to grant of compensation under Section 357(3) of the Cr.P.C. in cases arising from Section 138 of the N.I. Act is well settled. The object of Section 138 of the N.I. Act appears to be punitive as well as compensatory in nature as it provides a single forum and single proceeding for enforcement in criminal liability (for dishonouring the cheque) and for enforcement of civil liability (for realization of cheque amount). In the matter of **R. Vijayan v. Baby and another**⁷, Their Lordships of the Supreme Court culled out the following principle contained in provisions of Chapter-XVII of the Act, which states as under:-

⁷ (2012) 1 SCC 260

(i) The provision for levy of fine which is linked to the cheque amount and may extend to twice the amount of the cheque (Section 138) thereby rendering Section 357(3) virtually infructuous insofar as cheque dishonour cases are concerned.”

Their Lordships in the later part of judgment while considering the intention of legislature for enacting Section 138 of the N.I. Act has held as under:-

“17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under Section 357(1)(b) of the Code. Though a complaint under Section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under Section 357(1) (b) of the Code and the provision for compounding the offences under Section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary.

18. Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are

for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a “victim” in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine up to twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice.

19. We are conscious of the fact that proceedings under Section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. We are also conscious of the fact that compensation awarded under Section 357(1)(b) is not intended to be an elaborate exercise taking note of interest, etc. Our observations are necessitated due to the need to have uniformity and consistency in decision making. In same type of cheque dishonour cases, after convicting the accused, if some courts grant compensation and if some other courts do not grant compensation, the inconsistency, though perfectly acceptable in the eye of the law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. Citizens will not be able to arrange or regulate their affairs in a proper manner as they will not know whether they should simultaneously file a civil suit or not. The problem is aggravated having regard to the fact that in spite of Section 143(3) of the Act requiring the complaints in regard to cheque dishonour cases under

Section 138 of the Act to be concluded within six months from the date of the filing of the complaint, such cases seldom reach finality before three or four years let alone six months. These cases give rise to complications where civil suits have not been filed within three years on account of the pendency of the criminal cases. While it is not the duty of criminal courts to ensure that successful complainants get the cheque amount also, it is their duty to have uniformity and consistency with other courts dealing with similar cases.

24. Thus, it is quite vivid that under Section 138 of the N.I. Act Criminal Court is competent to levy fine up to twice the cheque amount and direct payment of such amount as compensation by way of restitution in regard to the loss on account of dishonour of cheque under Section 357(1)(b) of the Cr.P.C. and as such, the power under Section 357(3) of the Cr. P. C. cannot be exercised by Criminal Court in the cheque dishonour cases.

25. Turning back to the facts of the case it is apparent that the learned trial Magistrate after convicting the applicant for offence under Section 138 of the N.I. Act sentenced her to undergo simple imprisonment for one year and awarded compensation of Rs.2,50,000/- under Section 357(3) of the Cr.P.C. On appeal being preferred, the Court of Session modified the jail sentence of one year simple imprisonment to imprisonment till rising of the Court and enhanced the compensation from Rs.2,50,000/- to Rs.2,75,000/- and directed the said amount to be paid to the complainant.

26. Taking into consideration the provisions contained in Section 138 of the N.I. Act in which punishment imposable is two years imprisonment or with fine which can be twice to the amount of cheque and taking note of the law laid down in this behalf by Their Lordships of the Supreme Court in the aforesaid cases that the punishment to be awarded in Section 138 of the N.I. Act cases are meant to ensure payment of money and threat of jail is only to ensure recovery and as such, imposition of jail sentence is not mandatory, in the considered opinion of this Court, ends of justice would be served if only the applicant is punished with the fine sentence and she is fined to an amount equal to cheque amount *i.e.* Rs. 2,50,000/- and additional fine of Rs. 25,000/- towards interest on the said amount is imposed and accordingly applicant is sentenced to pay fine of Rs. 2,75,000/- in total and is directed that the total fine amount of Rs. 2,75,000/- be paid to the non-applicant/complainant under Section 357(1)(b) of the Cr.P.C. It is stated at bar that the applicant has deposited an amount of Rs. 1,37,500/- in compliance of this Court order dated 22/04/2013 and said amount shall be disbursed to the complainant/non-applicant forthwith. The remaining amount of compensation be deposited by applicant within a period of forty five days and it shall also be paid immediately thereafter to the complainant. If the balance fine amount is not deposited within forty five days from today, the applicant will undergo simple imprisonment for one month.

27. As a fallout and consequence of the aforesaid discussion, the criminal revision is allowed in part. The conviction of the applicant for offence under Section 138 of the N.I. Act is hereby maintained, whereas the jail sentence of the applicant is set aside and the fine sentence of Rs. 2,75,000/- as indicated hereinabove is imposed which is payable to the non-applicant/complainant under Section 357(1)(b) of the Cr.P.C.

Sd/-

(Sanjay K. Agrawal)
JUDGE

Tiwari

Head Note

For offence under Section 138 of the N.I. Act i.e. dishonour of the cheque, the jail sentence is not mandatory.

धारा 138 परक्राम्य लिखित अधिनियम के अतर्गत अपराध
अर्थात् चेक के अनादरण के लिए कैद की सजा आज्ञापक नहीं है।

(Yogesh Tiwari)
Private Secretary