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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO. 440 OF 2016**

Manik s/o Vithalrao Katmande

..PETITIONER

VERSUS

The State of Maharashtra & anr.

..RESPONDENTS

Mr M. V. Salunke, Advocate holding for Mr V. D. Salunke, Advocate for petitioner;

Mr D. V. Tele, Addl. Public Prosecutor for respondent No. 1;

Mr N. C. Swami, Advocate for respondent No. 2

**CORAM : N.W. SAMBRE, J.**

**DATE : 30<sup>th</sup> March, 2016**

**ORAL ORDER :**

The petitioner-accused came to be convicted for an offence punishable under section 138 of the Negotiable Instruments Act, by judgment and order dated 28<sup>th</sup> January, 2016, rendered by Judicial Magistrate First Class, Osmanabad (Court No.2), in Summary Criminal Case No.914 of 2012 and sentenced to suffer simple imprisonment for thirty days and to pay compensation of Rs.4,30,000/-, pursuant to the provisions of section 357 (3) of the Code of Criminal Procedure (for short "Code).

2. Aggrieved by the aforesaid judgment, the petitioner-accused preferred Criminal Appeal No.13 of 2016 before learned Additional

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Sessions Judge, Osmanabad and also moved an application seeking suspension of substantive sentence under section 389 of the Code and his release on bail. The said application came to be allowed by an order dated 26<sup>th</sup> February, 2016, passed by learned Additional Sessions Judge, Osmanabad, directing the petitioner to deposit 1/3<sup>rd</sup> of the compensation amount and upon doing so, the substantive sentence shall remain in abeyance pending the appeal. It is this order the petitioner is aggrieved by.

3. Mr Salunke, learned Counsel appearing on behalf of the petitioner, while trying to make out a case for indulgence by this Court in exercise of extraordinary jurisdiction, would urge that the condition so imposed while exercising powers under section 389 of the Code, ordering suspension of the substantive sentence and release of the petitioner on bail, is onerous and deposit of 1/3<sup>rd</sup> of the compensation amount, i.e. out of Rs.4,30,000/- is cumbersome and unreasonable. He would submit that the petitioner is not in a position to fulfill such condition.

4. Relying upon the judgment of the Apex Court, in the matter of ***Dilip S. Dhanukar vs. Kotak Mahindra Co. Ltd. & anr.***, reported in **2008 (1) Mh.L.J. 22**, learned Counsel would submit that such condition needs to be modified. He submits that he has instructions to make a statement that the petitioner is ready and willing to deposit an amount of Rs.50,000/- as a condition for his release on bail.

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5. Learned Counsel appearing on behalf of respondent no.2-complainant submits that the cheque that was dishonoured was for an amount of Rs.4,23,000/-. He would then submit that the proceedings are initiated and pursued since the year 2012. By relying upon the judgment of the Apex Court in the matter of **Stanny Felix Pinto vs. M/s Jangid Builders Pvt. Ltd. & anr.**, reported in **AIR 2001 SC 659**, he submits that the reasonable amount can always be directed to be deposited by the accused convicted for an offence punishable under section 138 of the Negotiable Instruments Act. He would then rely upon the judgment of this Court in the matter of **Maheshwar Dattatraya Kale vs. Capt. Atul Wasudeo Divekar & anr.**, reported in **2006 (1) Mh.L.J. 700**, so as to submit that suspension of the substantive sentence by the appellate court on depositing the half of the cheque amount is a reasonable condition.

6. Having bestowed my anxious thoughts to the submissions made, it is required to be noted that the petitioner-accused has taken recourse to the substantive right of appeal available to him under the statute. The statute confers a power on the appellate court, pursuant to the provisions of section 389 of the Code to order suspension of sentence pending the appeal and release of appellant on bail. Of course, while exercising such powers, discretion is vested in the appellate court and such discretion is required to be exercised in a reasonable manner.

7. While examining the legality and validity of the condition of deposit of 1/3<sup>rd</sup> of the compensation amount, in exercise of powers under section

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389 of the Code, it is to be noted that the petitioner was directed to deposit 1/3<sup>rd</sup> of the compensation amount which is around Rs.1,45,000/-. Whether the said condition is onerous is an issue that is required to be dwelt upon by this Court, particularly in the light of the judgments cited supra.

8. The Apex Court, in the matter of Dilip S. Dhanukar (supra) has taken a view that the Court while exercising powers under section 389 of the Code should have reasonable approach, as the statutory remedy of appeal is available to an accused and it is not the case that the accused is running away from the process of the Court. It is then required to be noted that in paragraph 72 of the said judgment the Apex Court has laid down criteria which are required to be taken into account.

9. Though the learned Counsel appearing on behalf of respondent no.2 has relied upon the judgment of the Apex Court in the matter of Stanny Felix Pinto (supra), the same has hardly any relevance in the facts of the present case, as what is directed in the present case is deposit of compensation and not the fine amount. The said judgment deals with the issue of fine amount. Apart therefrom, it is required to be noted that of the fine of Rs.20 Lacs imposed in the said case, it is only 1/5<sup>th</sup> of the amount, i.e. Rs.4 Lacs was directed to be deposited for release of the accused on bail.

10. So far as the judgment in the case of Maheshwar Dattatraya Kale (supra) is concerned, there also this Court was of the opinion that half of

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the amount as was directed to be deposited out of compensation amount was found to be reasonable condition.

11. Considering cumulative effect of the observations of the Apex Court in the matter of Dilip (Supra) and the decision of this Court in the matter of Maheshwar Kale (supra), it is required to be noted that in the present case the ends of justice would be met if the petitioner is directed to deposit an amount of Rs.75,000/- out of the compensation amount, before the learned Additional Sessions Judge, which would be a pre-condition for his release on bail, in exercise of powers under section 389 of the Code.

12. The petition thus succeeds.

The order dated 26<sup>th</sup> February, 2016, passed by Additional Sessions Judge, Osmanabad in Criminal Appeal No.13 of 2016 is modified.

It is directed that upon depositing an amount of Rs.75,000/- by the petitioner before the Sessions Court, the substantive sentence shall stand suspended and he be released on bail till final disposal of the said criminal appeal on furnishing P.R. Bond of Rs.15,000/- with one surety in the like amount.

Criminal Writ Petition stands partly allowed in above terms.

**(N.W. SAMBRE, J.)**

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