

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 561 OF 2004

Mallinath Kasinath Sevlange,
Age 40 years, occ. Business,
R/o Killari, Tq. Ausa, Dist. Latur.

..Petitioner

Versus

1. Tatyarao Mahadev Kamble
Age 50 years, Occ. President of
Sarvangin Vikas Sanstha, Latur.

2. Ku. Kranti Tatyarao Kamble
(Dhanegaonkar), Age 30 years,
Occupation Household

Both r/o Tanaji Chowk, Anand
Nagar, Latur.

..Respondents

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Advocate for Petitioner : Shri D.G.Nagode

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 20, 2016

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ORAL JUDGMENT :-

1. The petitioner is aggrieved by the order dated 31.7.2003, delivered by the learned Magistrate, by which, though accused Nos.1 and 2 are convicted for offences punishable under Section 138 of the Negotiable Instruments Act ("NI Act"), the fine imposed is of Rs. 2,500/- each despite the fact that the amount stated in the cheque, which is dishonoured is Rs.3,50,000/-. The petitioner is also aggrieved by the judgment of the learned Additional Sessions Judge dated 22.7.2004, by which, his Criminal Revision Petition was dismissed.

2. This petition was admitted on 6.6.2006.

3. On 6.6.2016, when the matter was taken up for final hearing, both the parties were absent. On 9.6.2016, none appeared for the respondents and hence the matter was posted on 15.6.2016, with the notice to the respondent that this Court would hear the petitioner if the respondents continues to remain absent. On 16.6.2016, none appeared for the respondents and hence the following order was passed by this Court:-

“1. On 9.6.2016, the following order was passed:-

“1. None appears for the respondents despite the matter being on board on 6.6.2016 and today.

2. Stand over to 15.6.2016. It is made clear that if none appears for the respondent, this Court would hear the petition and decide the petition considering that it is on the final hearing board and is pending adjudication for twelve years.”

2. None appeared for the respondents even today.

3. I have heard the submissions of Shri Nagode, learned Advocate for the petitioner.

4. By way of a last chance, S.O. to 20.6.2016 for passing orders.

5. In the event the respondent appears on the said date, an opportunity of hearing would be extended to him.”

4. Despite the above, none appears for the respondents even today.

5. I have heard the submissions of Shri Nagode, learned Advocate for the petitioner.

6. The issue raised before this Court is as to whether the Magistrate after concluding that the accused is guilty of the offence punishable under Section 138 of the NI Act, could be fined with a paltry amount of Rs.2,500/-, each when, the cheque that was dishonoured was for an amount of Rs.3,50,000/-.

7. From the impugned orders, I find that the learned Magistrate referred to Section 248(2) of the Code of Criminal Procedure, 1973 ("CrPC") and Section 138 of the NI Act, which read as under:-

"Code of Criminal Procedure - Section 248 - Acquittal or conviction.

(1)

(2) Where, in any case under this Chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 325 or section 360, he shall, after hearing the accused on the question of sentence, pass sentence upon him according to law.

(3)"

"Negotiable Instruments Act - Section 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."

8. There can be no dispute in so far as the power of the Magistrate in passing a sentence upon finding an accused guilty of the offence alleged to have been committed. So also, Section 138 provides for the Court to punish the accused, upon finding him guilty of dishonouring a cheque, with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. It is evident from the impugned orders that the case of the respondents does not fall in any of the exceptions set out below the proviso to Section 138 of the NI Act.

9. In this backdrop, the only issue that remains to be adjudicated upon is as to whether a fine of Rs.2,500/-, imposed upon each of the accused / respondents can be said to be commensurate to the amount of cheque that was dishonoured on account of the acts of the respondent.

10. An almost identical case was before the Honourable Supreme Court in the matter of Suganthi Suresh Kumar Vs. Jagdeeshan [2002 Cri.L.J. 1003]. In paragraph No.12 of the judgment, the Honourable Apex Court noted that the amount set out in the cheques dishonoured was Rs.4,50,000/-. A flea-bite sentence was imposed upon the accused who happily accepted the same since the amount of Rs.4,50,000/- was not to be paid by them in the light of the impugned order. The Court therefore, observed that the very object of enacting Section 138 would be defeated if such matters are

treated lightly. Paragraph No.12 of the said judgment reads as under;-

“12. The total amount covered by the cheques involved in the present two cases was Rs. 4,50,000/-. There is no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial court or revision before the High Court or this Court. If the amounts had been paid to the complainant there perhaps would have been justification for imposing a flee-bite sentence as had been chosen by the trial court. But in a case where the amount covered by the cheque remained unpaid it should be the look out of the trial magistrates that the sentence for the offence under Section 138 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 light heartedly. The very object of enactment of provisions like 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount atleast during the pendency of the case.”

11. In the Suganthi judgment (supra), the Honourable Apex Court remanded the matter to the learned Magistrate by observing in paragraph Nos.13 to 15 as under:-

“13. Learned counsel for the respondent contended that the complainant had subsequently filed a civil suit and attached all the properties of the respondent. That is not a ground for lessening the gravity of the offence or to impose a minor sentence chosen by the trial court.

14. As we propose to remit the case back to the trial court, we do

not wish to indicate what exactly should be the limit of proper sentence to be passed. The trial Magistrate shall hear both sides once again in the matter of sentence and pass a sentence which is condign. We, therefore, set aside the sentence passed on the respondent and remit the case back to the trial Magistrate for passing appropriate sentence on the respondent after hearing both sides.

15. Learned counsel for the respondent made a plea that if the respondent is able to make payment of the amount covered by the cheques he shall not be debarred from taking up the plea for mitigation of the sentence. The respondent will be entitled to make such a plea in the event of his succeeding in paying the amount covered by the cheques.”

12. Learned Advocate for the petitioner, therefore, submits that considering the fact that the cheque at issue was dated 13.6.1999 and considering the passage of time of 17 years, the learned Magistrate be directed to decide the issue of quantum of sentence and fine expeditiously.

13. In the light of the above, this petition is partly allowed, with the following directions:-

(A) The impugned order dated 31.7.2003, passed by the learned Magistrate is set aside only to the extent of Clause (2) of the operative part of the order below paragraph No.10. The conclusions of the Magistrate convicting the respondents / accused in Clause (1) is sustained. Consequentially, Clause (3) of the order stands set aside.

(B) The impugned judgment of the revisional Court dated 22.7.2004 is set aside.

(C) The proceedings STCC No.10088 of 1999 are remitted back to the learned Magistrate at Latur with a direction that it shall hear the petitioner as well as the respondents / accused on the issue of quantum of punishment and grant of fine as per Section 138 of the Negotiable Instruments Act and by keeping in view the observations of the Honourable Supreme Court in the Suganthi judgment (supra).

(D) Needless to state, the passage of about 17 years from the date of the cheque shall be considered by the Magistrate as a ground for imposing higher fine within the framework of Section 138 of the Negotiable Instruments Act.

(E) Since the petitioner is agreeable to appear before the Magistrate on 8.7.2016, notice will be issued only to the respondents / accused expeditiously and after hearing the accused the Magistrate shall decide the proceedings and pass appropriate orders as directed above, on/or before 27.8.2016.

14. Rule is made partly absolute in the above terms.

15. No order as to costs.

(RAVINDRA V. GHUGE, J.)

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