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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-15631 of 2016

Date of decision: November 29, 2016

Kulwant Singh

.....Petitioner

Versus

Avtar Singh Saini

.....Respondent

CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI

Present: Mr. Palvinder Singh Sarna, Advocate for the petitioner.

None for the respondent.

A.B. CHAUDHARI, J (Oral)

Rule. Heard learned counsel for the petitioner for final disposal.

This Court, on 15.07.2016 had made an order issuing notice of motion for final disposal. Office report dated 17.08.2016 shows that the respondent was served through his wife. Thereafter, the matter was adjourned from time to time but there is no appearance for the contesting respondent. Since notice of motion for final disposal has been duly served on contesting respondent, this Court proceeds with the matter for final disposal.

The petitioner had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short 'Act') against the respondent in the matter of bouncing of one cheque in the sum of ₹24 lacs. The trial Court vide order dated 11.07.2014 held that the complainant had proved his case and thus, recorded a finding of

conviction. However, while making the order of sentence, he made the following observations in Paras 4 and 5, which I quote as under:

“4. The object of bringing Section 138 of Negotiable Instruments Act, 1881 into the statute was to inculcate faith in the efficacy of banking operations and credibility in transacting business of enactable instrument. It was to enhance the acceptability of cheques due to insufficient arrangements made by the drawer with the adequate safeguard to prevent harassment of honest drawers. If cheque is dishonored for insufficiency of funds in the drawer's account, the drawer is to be punished for imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of cheque or with both. Legislative intent in enacting Section 138 was to provide a criminal remedy in order to deter the worrying high incidents of dishonoring of cheque. Further, Negotiable Instruments act, 1881 is more in the nature of providing monetary Act is more in the nature of ensuring sanctity of commercial relations.

5. Keeping in view the arguments of learned counsel for the parties as well as legislative intent behind the enactment of the present Act, the present court is of the opinion that the convict is made liable to undergo imprisonment for a period of six months with fine of Rs.5000/-. It is hereby made clear that the period of imprisonment/detention, if any, which the convict has already undergone as under trial shall be set-off from the sentence awarded today, and in default of payment of fine, the convict shall undergo simple imprisonment for 15 days. Fine not paid. File be consigned to the records after due compliance.

(Ashok Kr. Mann)

Pronounced in open court Judicial Magistrate Ist Class
11.07.2014 Chandigarh.”

It is clear from the above that the trial Judge was fully aware of the fact that the cheque amount was ₹24 lacs and he himself recorded a finding of conviction and imposed sentence of 6 months and petty fine of ₹5,000/- without making any order of compensation. The reasons part of the order does not in anywhere show as to why learned trial Judge ignored the provisions of Section 138 of the Act that fine, which may extend twice the amount of cheque in this case, i.e. ₹24 lacs, was required to be awarded. It appears from Paras 4 and 5 of the order that the learned trial Judge was fully aware about the said provision as well as the cheque amount but then while making the effective order, he did not make any order of fine/compensation payable to the complainant either in the sum of ₹24 lacs or double the said amount, but made order for payment of fine of ₹5,000/- leaving the complainant high and dry.

In my opinion, the learned trial Judge, namely Sh. Ashok KR. Mann is under an obligation to satisfactorily explain the above act of omission to this Court by filing an affidavit in this Court. Hence, the Registry is directed to call upon the learned Judge to tender an explanation on affidavit to this Court.

Coming back to the merits of the present petition, the petitioner had then filed appeal before the lower Appellate Court against the aforesaid judgment and order dated 10.07.2014 passed by the trial Court, obviously for enhancing/awarding fine/compensation

and also enhancement of sentence. The appeal was called out for hearing on 21.10.2014 before the lower Appellate Court but since the petitioner's counsel did not appear before the lower Appellate Court, the appeal was dismissed-in-default. The explanation for absence on that date is given in Para 5 of the petition supported by documentary evidence (Annexure P-1). I quote Para 5 which reads thus:-

“5. That the absence of the petitioner/his counsel on 21.10.2014 was due to the fact that the clerk of the counsel of the petitioner forgot to make entry of the case, in the case diary for 21.10.2014. As such the said absence was not intentional but due to the above mentioned reason. Copy of the case diary of 21.10.2014 is attached as Annexure P-1.”

Since the lower Appellate Court does not have power to review its order, the present petition has been filed before this Court. In my opinion, looking to the nature of huge claim of the petitioner who eventually got a finding of conviction in his favour but without any relief from the trial Court, the order dismissing his appeal in-default ought to be set aside and his appeal ought to be heard on merits.

Learned counsel for the petitioner, on instructions from the petitioner, makes a statement that hereinafter, the petitioner would not make any default in prosecuting his appeal before the lower Appellate Court.

In the result, the petition is allowed. The impugned order dated 21.10.2014 dismissing the appeal filed by the applicant in-

default is set aside. Appeal before the lower Appellate Court stands restored and the same shall be heard on its own merits without being influenced by any of the observations made by this Court in the present order in relation to the observations made above. The proceedings in appeal shall be decided within a period of 10 months from today. Petitioner to appear before the lower Appellate Court on 19.12.2016 and the lower Appellate Court shall thereafter, proceed further in accordance with law.

The date for obtaining the affidavit from the Sh. Ashok KR. Mann, JMIC, Chandigarh is fixed for 09.12.2016. Put up on 09.12.2016.

(A.B. CHAUDHARI)
JUDGE

November 29, 2016

mahavir

Whether speaking/ reasoned: Yes/No

Whether Reportable: Yes/No