

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.1639 OF 2017

Vijay Narayan Athalye & Ors. ...Petitioners

Versus

Nipra Packaging Pvt. Ltd. ...Respondent

.....

Mr. Subodh Desai i/b. Mr. Pawan Mali for the Petitioners.

Mr. Rajesh Kanajia i/b. M/s. Res Juris for the Respondent.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 13th DECEMBER, 2017.

P.C.:-

With consent of the parties, matter is taken up for final disposal at the stage of admission.

2. The Petitioners herein have challenged the order dated 14th February, 2017 whereby the learned Magistrate, Silvassa had issued process under Section 138 of the Negotiable Instruments Act.

3. Mr. Subodh Desai, the learned counsel for the Petitioners submits that the Petitioners had not received the statutory notice and that immediately on receipt of the summons the Petitioners had filed an application before the learned Magistrate to permit him to deposit

the cheque amount. It appears that the Respondent complainant had raised objection for deposit of the said money. In view of the said objections raised by the Respondent -complainant, the learned Magistrate did not pass any further order in the application and only passed an order to “file the application”.

4. By order dated 25th April, 2017 this Court had permitted the Petitioners to deposit the said amount. Accordingly the cheque amount of Rs.1,00,000/- has been deposited before the Trial Court.

5. The learned counsel for the Petitioners relying on the decision of the Apex Court in *M/s. Meters and Instruments Private Limited & Anr. Vs. Kanchan Mehta, 2017 (6) BCR 437* has submitted that since the Petitioners have deposited the entire cheque amount on the first available opportunity, the offence may be compounded. He has further stated that the Petitioners are ready to pay compensation to any charitable institution or to the Maharashtra State Legal Services Authority.

6. Mr. Rajesh Kanajia, the learned counsel for the Respondent-complainant has submitted that the complainant does not wish to

compound the offence. Relying upon the decision of the Apex Court in *JIK Industries Limited and Others Vs. Amarlal V. Jumani and Anr. 2012 (3) SCC 255* he submits that the complaint cannot be compounded without consent of the complainant. He submits that the complainant is not interested in receiving the money but is rather interested in penalising the Petitioners.

7. I have perused the records and considered the submissions advanced by Mr. Subodh Desai, learned counsel for the Petitioners and Mr. Rajesh Kanajia, the learned counsel for the Respondent.

8. It is not in dispute that the Respondent -complainant had filed a complaint under Section 138 of the Negotiable Instruments Act in view of dishonour of two cheques dated 13.9.2016 and 26.9.2016 for an amount of Rs.50,000/- each. The Respondent had issued statutory demand notice calling upon the Petitioners to make the payment within a period of 15 days. The Petitioners, upon being served with the summons, had filed an application dated 30th March, 2017 before the learned Magistrate seeking leave to deposit the said cheques amount by way of two Demand Drafts drawn in the name of the Respondent. In the said application, the Petitioners had made a

specific statement that he had not received the statutory notice. The said application was filed immediately after receipt of the summons. The learned Magistrate did not pass any order on the said application and simply ordered to 'file' the application in view of the objections raised by the Respondent.

9. In this respect, it is pertinent to note that the case of ***C.C. Alavi Haji Vs. Palapetty Muhammed and Anr. (2007) 6 SCC 555*** the Apex Court has held that requirement of giving statutory notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. The Apex Court has further observed that any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons by receiving a copy of complaint with the summons, and therefore, the complaint is liable to be rejected.

10. In the instant case, as stated earlier immediately on receipt of the summons, the Petitioners had appeared before the Court and

had filed an application for deposit of the amount. He had made a categorical statement that he had not received the notice and had sought leave to deposit the money. The Petitioner had further gave no objection to pay the said amount to the Respondent-complainant. Despite which the Respondent-complainant has not consented to compound the offence.

11. It may be mentioned that Section 147 provides that notwithstanding anything contained in the the Code of Criminal Procedure, 1973 the offence punishable under this Act shall be compoundable. In the case of *JK Industries Limited and Others*, supra the Apex Court has held that :-

“Section 147 of the N.I. Act must be reasonably construed to mean that as a result of the said Section the offences under N.I. Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of N.I. Act.”

12 It is to be noted that in the recent judgment in *M/s. Meters*

and Instruments Private Limited & Anr, supra the Apex Court, after considering the previous decisions including the decision in *Damodar S. Prabhu Vs. Sayed Babalal H. 2010 5 SCC 663* and *JIK Industries supra*, has held that :-

“18. From the above discussion following aspects emerge:

- i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is “preponderance of probabilities”. The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.
- ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.
- iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.
- iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart

from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

- v) *Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances."*

13. It is thus settled that even in the absence of consent for compounding the offence, the Court can in its discretion close the proceedings and discharge the accused if the court is satisfied that the complainant has been duly compensated. In the instant case, the Petitioners-accused had appeared before the Trial Court immediately on receipt of the summons and had sought leave to deposit the cheque amount. Since the learned Magistrate had not allowed him to deposit the money, the Petitioner-accused has approached this Court and

pursuant to the order dated 25th April, 2017, he has deposited the cheque amount before this Court. The learned counsel for the Petitioners has also shown his willingness to pay compensation, as determined by the Court. Though the learned counsel for the Respondent has stated that the Respondent is not interested in receiving any compensation, considering the fact that the Respondent was compelled to pursue legal remedy, in my view, it would be just and proper to direct the Petitioners to pay to the Respondent an amount of Rs.20,000/- towards compensation and in addition to pay costs of Rs.10,000/- to be paid to the Tata Memorial Hospital, Mumbai.

14. In my considered view there are no valid reasons to keep the proceedings pending. It will not serve any purpose but will only further add to the mounting arrears resulting in docket explosion. Considering the fact that the Petitioners have deposited the cheque amount at the first available opportunity and has shown willingness to compensate the Respondent-complainant, interest of justice demands that the proceedings should be closed despite absence of consent.

15. In the light of above, the impugned order is set aside. The proceedings under Section 138 of the Negotiable Instruments Act are

closed and the Petitioners-accused are discharged of offence under Section 138 of the NI Act subject to the Petitioners paying an amount of Rs.20,000/- to the Respondent towards compensation and costs of Rs.10,000/- to the Tata Memorial Hospital, Mumbai, within a period of two weeks from the date on which this order is uploaded.

16. The Petition stands disposed of in above terms.

(ANUJA PRABHUDESSAI, J.)