

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 214 OF 2016

Suresh Yedbaji Jantre,
Age 62 years, Occupation Agri. &
Business, R/o Dhoki Road, Kallam,
Tq. Kallam Dist. Osmanabad. .. Petitioner

VS.

1. The State of Maharashtra,
Through Collector, Osmanabad.
2. Deepak Eknath Vedpathak,
Age 53 years, Occupation Business,
R/o Sarafi Shop, Navin Sonar
Galli, Kallam Tq. Kallam
Dist. Osmanabad. .. Respondents

Mr. A. T. Jadhavar, Advocate for the petitioner.
Mr. S. W. Mundhe, Addl. Public Prosecutor for respondent
No.1/ State.
Mr. A.B. Tele, Advocate for respondent No.2.

CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the Judgment : 18th January, 2018.**

**Date of pronouncing
the Judgment : 07th February, 2018.**

ORAL JUDGMENT (Per Smt. Vibha Kankanwadi. J.)

1. Present revision has been filed by the original complainant by invoking the power of this Court under Sec. 401 of Code of Criminal Procedure in order to challenge the judgment and

order passed by Additional Sessions Judge, Osmanabad in Criminal Appeal No. 57 of 2013; whereby the sentence awarded to the respondent for the offence punishable under Sec. 138 of Negotiable Instruments Act came to be modified.

2. Present revision applicant is the original complainant, who had filed complaint bearing S. C. C. No. 394 of 2009 against the present respondent alleging that he has committed offence punishable under Sec. 138 of N. I. Act. It is necessary to have a glance at the allegations in the original complaint, at this stage, in order to appreciate further facts. Complainant had come with a case that he was knowing accused since long and had friendly relations with him. Accused was in need of money and therefore requested complainant on 15-08-2006 to extend hand loan of Rs.70,000/-. Complainant agreed and issued cheque in favour of accused on 17-08-2006. Accused had encashed the said cheque and assured to return the amount within one month. When complainant asked for the refund of the amount after the stipulated period, accused took certain time; but ultimately issued cheque for Rs.70,000/- bearing No. 512801 drawn on State Bank Of Hyderabad on 22-07-2009. When complainant had deposited the said cheque in his Bank for encashment, it was dishonoured on the ground 'Funds Insufficient'. Complainant issued legal notice on 03-08-2009 and demanded the amount under the cheque. The said notice was received by the

accused, but he did not comply with the same. Hence, he filed the complaint.

3. After the complaint was filed, verification was recorded by learned Judicial Magistrate First Class, Kalamb. Plea of the accused was recorded; wherein he pleaded not guilty. Trial has been conducted. Statement of the accused under Sec. 313 of Code of Criminal Procedure has been recorded. After hearing both sides, the learned Magistrate has convicted the accused after holding him guilty of the said offence. Accused was sentenced to undergo simple imprisonment for 4 months and pay fine of Rs.3,000/- i/d. to suffer S. I. for 15 days.

4. Accused had challenged the said conviction in Criminal Appeal bearing No. 57 of 2013. After hearing both sides, learned Additional Sessions Judge, Osmanabad allowed the same on 29-06-2016. It is to be noted that Appellate Court had confirmed the finding of the learned Magistrate of holding accused guilty, but modified the sentence. Appellate Court had set aside the conviction of the accused as was awarded by Magistrate and instead of the same it was altered to 'till rising of the Court with confirmation of fine'. This alteration or modification has been challenged by the original complainant in this revision.

5. Heard learned Advocate Shri. S. Y. Jantre for the revision applicant/ original complainant and learned Advocate Shri. A. B. Tele for revision respondent No. 2. Learned APP has represented revision respondent No. 1, who is a formal party. Matter was taken up for final hearing with consent of both the parties.

6. It has been vehemently submitted on behalf of complainant that the alteration in the sentence by the first appellate court is illegal and unnecessary exercise of leniency. When the learned appellate Court was confirming the finding about guilt of the accused, then the sentence that was awarded also ought to have been confirmed. There were no circumstances before the first appellate Court to alter the sentence. He relied on the decision in ***M/s. Nagpal Traders v/s. Davinder Singh*** reported in **2015 ALL MR (Cri) 1630 (S.C.)** and ***H. Pukhraj v/s. D. Parasmal*** reported in **2015 ALL MR (Cri) 1627 (S.C.)** in order to support his submissions.

7. Per contra, it has been submitted on behalf of respondent No. 2 that even the trial Court had not allowed compensation to the complainant and he had not challenged the order to that effect. He is now even challenging the order passed by Magistrate, which he can not. The sentence was reduced/ altered by the Appellate Court taking into consideration the submission on

behalf of accused that he is old and is suffering from illness. Appellate Court has given reason for the alteration and there is no need to interfere in the discretion that has been used by the appellate Court. He relied on the decision in ***Prem Chand Goyal v/s. State of Rajasthan and Anr*** reported in **2013 DGLS (Raj) 465** and challenged the maintainability of the revision.

8. The scope of this revision is very limited. Original accused has not challenged the finding of the Appellate Court whereby it has been confirmed that complainant has proved that accused has committed offence punishable under Sec. 138 of N. I. Act. Thus, the said finding has become final. Therefore, it is not necessary to dwell upon the merits of the evidence for holding the accused guilty. It is important to note that after the accused was convicted by learned JMFC, Kalamb and he had not awarded compensation to the complainant. Complainant had not challenged the said order of conviction on that ground. Now he has only challenged the order of alteration of sentence by the appellate Court.

9. As afore-said, appellate Court has confirmed the finding of the trial Court regarding holding the accused guilty of committing the offence punishable under Sec. 138 of N. I. Act. Therefore, whether it was open for the appellate Court to take a lenient view rather than confirming the quantum of sentence is a question. First

of all, it is necessary to see what are the reasons given by appellate Court while showing the leniency. It has been observed by appellate Court that learned Advocate appearing for accused has put a *Pursis* on record at Ex.23 stating that accused is of advance age and suffering from senile maladies, it was urged that lighter punishment of till rising Court on the ground that the accused is under the litigation since last seven years be awarded. The said submissions were opposed by learned Advocate appearing for complainant. The learned Additional Sessions Judge has concluded on the basis of those submissions that long drawn litigation, growing age of accused and old age diseases prompt him to show leniency to the accused.

10. Interestingly, such leniency has been shown by the learned Additional Sessions Judge on the basis of *Pursis* filed on behalf of accused. There was no document attached to that *Pursis* to show the alleged illness of the accused. The appeal memo showed the age of the accused as 50 years, when it was filed in 2013. Appellate Court has decided the appeal on 29-06-2016. We may add three more years to the age of the accused; thereby he would be aged 53 – 54 years on the date of decision in appeal. It can not be said to be old age. Thus, when there was absolutely no evidence on record to show the illness of the accused, the learned Additional Sessions Judge ought to have restrained himself from believing in the contents of the *Pursis*. The nature of the alleged illness also does

not appear to be major. Another ground on which leniency is shown is the long driven litigation. In fact, there are catena of judgments of this Court and Apex Court wherein it has been held that long driven litigation is not at all a ground to show the leniency. Further, it ought to have been considered that even the complainant was litigating for all these years. Then only accused can not be given benefit of long driven litigation. Learned Additional Sessions Judge, had not thought it fit to enhance the fine amount on that ground, while showing leniency and then award compensation to the complainant. Therefore, accused can not be allowed to take undue advantage of the pendency of the matter for all these years. Learned Appellate Court has also not taken into consideration at that stage as to on whose account the matter was prolonged. Learned Additional Sessions Judge has failed to strike a balance between sufferings of the complainant and points to show leniency in favour of accused.

11. It has been observed by the Apex Court in ***M/s. Nagpal Traders'*** case (supra) that,

*"We may also refer to the judgment of this Court in the case of Jeetu @ Jitendra (***Jeetu @ Jitendra & Ors. V/s. State of Chhattisgarh 2013 ALL MR (Cri) 345 (S.C.)***) where this Court has while considering as to how the appeal should be disposed of by the appellate court when there is no challenge to conviction observed that it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to*

deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. This Court further noted that there are many cases where the High Courts after recording the non-challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. It was observed that such a course is impermissible in law and should not be resorted to. We respectfully agree with this view of this Court. We are dealing with one of such cases. In our opinion, the High Court should not have shown leniency to the respondent”.

In this case Hon'ble Supreme Court has restored the order of the trial Court.

12. Further in **H. Pukhraj'** s case, Apex Court has taken a similar view based on **Suganthi Suresh Kumar v/s. Jagdeeshan [(2002) 2 SCC 420]** and **R. Vijayan v/s. Baby & Anr [(2012) 1 SCC 260]**. In this case though the trial Court had sentenced accused therein to undergo six months imprisonment and also to pay fine of Rs.4,000/- i/d. To undergo three months further imprisonment and it was confirmed by Additional Sessions Judge, the said sentence was modified by High Court. High Court had directed accused to either to pay compensation of Rs.2,00,000/- or to undergo imprisonment for two months. However, after taking note of afore-said judgments, Apex Court has modified the sentence further. It had directed the accused therein to undergo simple

imprisonment for a period of 6 months and directed him to pay compensation of Rs.10,00,000/- to the complainant i/d. to undergo simple imprisonment for 6 months. Ratio in both the above said decisions are applicable here.

13. Here in this matter, though complainant had not preferred any appeal challenging the sentence awarded by JMFC prayer for granting the compensation can be considered to mitigate the situation. It has been observed in **H. Pukhraj's** case that,

"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 upto 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."

"We are conscious of the fact that proceedings under Sec. 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 Sec. 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 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 Sec. 143 (3) of the Act requiring the complaints in regard to cheque dishonour cases under Sec. 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”.

Thus, it is to be noted that Apex Court was in favour of payment of compensation by way of restitution in regard to loss would be practical and realistic. Therefore, in this case also, when the alteration was made by Appellate Court without any reasonable ground, instead of restoring the order of the trial Court, it would be in the interest of the parties to direct the respondent/ original accused to pay compensation to the complainant. Further another important point that is required to be considered is that the accused herein/ present respondent No. 2 has already undergone the modified sentence i.e. till rising of Court. Therefore, it can not be set aside now. Instead of the same, the above-said practical view is required to be taken.

14. Since the learned Additional Sessions Judge, Osmanabad had unnecessarily taken a lenient view and altered the sentence awarded to the accused on the basis of only a pursis, which can not be said to be an evidence; the said order of alteration of sentence

requires to be modified. The amount of the cheque involved in the matter was Rs.70,000/-. Though in R. Vijayan Hon'ble Supreme Court had advised to award interest @9% p.a., such interest can not be awarded here in this case, as complainant had not filed any appeal or revision challenging the order of refusal of grant compensation. The compensation that would be awarded now to the complainant is the outcome of the afore-said reasons. Therefore, awarding amount equivalent to the cheque amount would serve the interest of both the parties. Hence, following order is passed.

ORDER

1. Criminal Revision Application is hereby partly allowed.
2. Respondent No. 2/ original accused is sentenced to pay fine of Rs. 70,000/- for the offence punishable under Sec. 138 of Negotiable Instruments Act. This amount of fine is in addition to the fine amount Rs. 3,000/- already deposited. The said amount be deposited by the respondent No. 2/ accused in the trial Court within a period of 4 weeks from today.
3. In default of payment of said fine amount, accused will have to undergo simple imprisonment for a period of one month.
4. After the amount of fine is deposited in the trial Court, it be given to complainant under Sec. 357 (1) of Code of Criminal Procedure.

5. It is clarified that the sentence of imprisonment till rising of Court awarded by Learned Additional Sessions Judge in Cri. Appeal No. 57 of 2013 on 29-06-2016 is hereby not altered.

**[SMT. VIBHA KANKANWADI]
JUDGE**

vjg/-.