

HONOURABLE SRI JUSTICE P. KESHA VA RAO

CRIMINAL PETITION No. 11701 of 2011

ORDER:

Heard the learned counsel for the parties.

The prayer sought in the criminal petition is as under:

“The Hon’ble Court may be pleased to compound the offence under Section 138 of the Negotiable Instruments Act and acquit A-1 and A-2 by quashing the order passed in CrI.M.P.No.29 of 2010 in CrI.A.No.36 of 2007 on the file of the VIII Additional District and Sessions Judge (Fast Track Court), East Godavari, Rajahmundry.”

The facts of the case are that the first respondent herein filed a private complaint vide C.C. No.351 of 2003 against the petitioners for the offence punishable under Section 138 of the Negotiable Instruments Act (for short ‘the Act’), on the file of the Additional Judicial Magistrate of First Class, Ramachandrapuram. On contest, by judgment dated 25.01.2007, the trial Court, convicted A-2 and imposed sentence of simple imprisonment for a period of six months and also fine of Rs.5,000/- in default of payment of fine amount, he shall suffer simple imprisonment for a period of one month. A-1 being the Firm, it was sentenced to pay fine of Rs.5,000/- in default of payment of fine, A-2 being its Managing Director shall undergo simple imprisonment for a period of one month. Aggrieved by the said judgment, the petitioners filed an appeal vide CrI.A.No.36 of 2007 before the Court of VIII Additional District and Sessions Judge (Fast Track Court) East Godavari District, Rajahmundry. During the pendency of the appeal, the petitioners herein filed CrI.M.P.No.29

of 2010 under Section 147 of the Act for compounding the offence. The first respondent filed a counter and opposed the same. The appellate Court dismissed the said petition by orders dated 21.10.2011. Aggrieved by the same, the present criminal petition is filed.

Learned counsel appearing for the petitioners would contend that the cheque amount being Rs.30,000/-, the petitioners furnished a draft for Rs.30,000/- before the Court below drawn in favour of the first respondent at Andhra bank, Aryapuram Branch, Rajahmundry dated 23.11.2010 and also prepared to deposit 15% of the cheque amount towards costs before the District Legal Services Authority, Rajahmundry as per the guidelines framed by the Apex Court for compounding the offence. However, the lower appellate Court failed to consider the issue in the light of the guidelines framed by the Apex Court and sought for quashment of the impugned proceedings in the present criminal petition. To substantiate his contention, he relied on the judgment of the Apex Court in CrI.A.No.1731 of 2017 dated 5.10.2017 (Arising out of Special Leave Petition (CrI.) No.5451 of 2017) in *M/S. METERS AND INSTRUMENTS PRIVATE LIMITED & ANOTHER v. KANCHAN MEHTA*¹. The facts of the said case are similar to the facts on hand. The Apex Court while dealing with the aspect of compounding of an offence under Section 138 of the Act, considered various judgments in *INDIAN BANK ASSOCIATION AND OTHERS v. UNION OF INDIA AND OTHERS*²,

¹ Judgment of the Apex Court in CrI.A.No.1731 of 2017

² (2014) 5 SCC 590

the Apex Court approved the directions of the Bombay High Court, Calcutta High Court and Delhi High Court for laying down simpler procedure for disposal of cases under Section 138 of the Act and directed as follows:

“23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given:

23.1. The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinise the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

23.2. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3. The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4. The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 CrPC to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

23.5. The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses instead of examining them in the court. The witnesses to the complaint and the accused must be available for cross-examination as and when there is direction to this effect by the court.

24. We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the abovementioned procedures for speedy and expeditious disposal of cases

falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of, as above."

After discussing the object of introducing Section 138 and other provisions of Chapter 17 of the Act in the year 1988 and the Amendments made thereafter and also the nature of offence under Section 138 of the Act, primarily related to civil wrong and 2002 Amendments specifically made it compoundable, observed the following points:

- i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view of 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 17 assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.
- ii) 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) 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) 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) 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."

In the case on hand, the petitioners filed a separate miscellaneous petition vide Cr.M.P.No.29 of 2010 under Section 147 of the Act for compounding the offence. But, the same was dismissed on the ground that without the consent of the victim, there cannot be any compromise or settlement.

Looking into the basic object of the provision that it is both punitive as well as compensatory, it is to be understood that the intention of the provision is to ensure that the complainant received the amount of cheque by way of compensation. At the same time, it is to be noted that the nature of the offence under Section 138 of the Act is primarily related to a civil wrong, the 2002 amendment specifically made it compoundable. In these circumstances, when an application is filed for compounding the offence, the same cannot be negated on the ground that the consent of the

complainant is a pre-condition. If that is accepted, it may go even against the basic object of the provision and negative the very intention of the legislature for which such provision and the 2002 amendment was brought into picture. Even the Apex Court while dealing with the issue in the above said appeal, was pleased to hold that 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. Therefore, in the present case when an application has already been filed by the petitioners expressing their intention to compound the offence by way of paying the cheque amount and also to deposit 15% of the amount towards costs before the District Legal Services Authority, Rajahmundry, the lower appellate Court ought to have considered the same and permitted the parties to settle the issue by compounding the offence. However, in the case on hand, it is brought to the notice of the Court by the learned counsel for the petitioners that by virtue of the interim orders passed by this Court on 21.10.2011 in CrI.M.P.No.29 of 2010, the criminal appeal is still pending before the lower appellate Court. In these circumstances, this Court feels appropriate to set aside the orders passed in CrI.M.P.No.29 of 2010 dated 21.10.2011, directing the lower appellate Court to dispose of the same by fixing the appropriate compensation acceptable to both parties or to the Court in the event of the first respondent not coming forward to settle the issue.

Accordingly, the criminal petition is allowed setting aside the orders passed in CrI.M.P.No.29 of 2010 dated 21.10.2011 and the learned VIII Additional District and Sessions Judge, Rajahmundry is directed to pass appropriate orders in consultation with both parties or in the event of the first respondent not coming forward, by fixing a reasonable compensation for compounding the offence.

Miscellaneous petitions, if any, pending in this criminal petition shall stand closed.

Date:19.04.2018
Ccm

P. KESHA VA RAO,J



HONOURABLE SRI JUSTICE P. KESHAVA RAO



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Date:19.04.2018

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