

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

253-A

CRM-M No.14570 of 2018
Date of Decision: 19.09.2018

PARMOD KUMAR

...Petitioner

Versus

AJAY TEWATIA

...Respondent

CORAM:- HON'BLE MR. JUSTICE SUDHIR MITTAL.

Present:- Mr. D.S. Matya, Advocate,
for the petitioner.

SUDHIR MITTAL, J. (Oral)

The petitioner was convicted for the offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as Act) and sentenced to undergo simple imprisonment for a period of three months and to pay compensation of ₹11.25 lacs within one month from the date of the order. The Cheque amount in this case was ₹7.5 lacs.

The petitioner preferred an appeal against his conviction and sentence. The appeal was admitted while suspending the sentence and condition was imposed that the petitioner would deposit a bank draft of an amount of ₹ 3.75 lacs (half of the cheque amount/furnish bank guarantee to the extent of ₹ 3.75 lacs/make an FDR in the sum of ₹ 3.75 lacs) in favour of the complainant within 15 days from the date of the order. The same was done by placing reliance upon judgment of the Supreme Court in 'Dilip S. Dahanukar Vs. Kotak Mahindra Co.Ltd. & Anr., 2007(2) R.C.R. (Criminal) 636'. The imposition of the aforementioned condition while suspending the sentence of the petitioner is under challenge in the present

petition.

Learned counsel for the petitioner submits that Section 357(2) Cr. P.C. bars recovery of fine during the pendency of the appeal. Compensation awarded by the Court is similar in nature to 'fine' as is evident from Section 357(1) (b) Cr. P.C. The said provision provides for award of the whole or any part of 'fine' for compensating a person who has suffered loss or injury on account of offence. A Court can award compensation in exercise of jurisdiction in it under Section 357(3) Cr.P.C. and compensation is to be awarded for the purpose of making good any loss or injury caused on account of offence. Since application of fine and recovery of compensation is for the same purpose, the bar of Section 357 (2) Cr. P.C. would be squarely attracted. It is further submitted that filing of an appeal is a statutory right and by virtue of the enlarged meaning given to Article 21 of the Constitution of India, it is also a constitutional and fundamental right. Such a right cannot be curtailed by imposing condition while suspending the sentence and thus, the condition imposed by the Lower Appellate Court is not sustainable. He by relying upon the judgment of **Dalip S. Dahanukar's case (supra)** and submits that the said judgment had been misinterpreted by the learned Lower Appellate Court.

A perusal of Section 138 of the Act shows that the punishment provided for a violation thereof is 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. There is no power of awarding compensation. For awarding compensation, the Court would have to rely upon its power under Section 357(3) Cr. P.C. Thus, the question whether Section 357 (2) Cr. P.C. bars the recovery of compensation during the pendency of an appeal is to be

examined with reference to the fact that the compensation imposed is in exercise of powers under Section 357(3) Cr. P.C.

In the aforementioned context, the judgment of **Dilip S. Dahanukar's case (supra)** needs to be interpreted. Certain paragraphs of the said judgment are reproduced herein below:-

“2. Interpretation of Section 357 of the Code of Criminal Procedure, 1973 ('the Code', for short) vis-à-vis the provisions of the Negotiable Instruments Act ('the Act', for short), as regards power to impose sentence of fine is involved in these appeals which arise out of a judgment and order dated 6.6.2006 passed by the High Court of Bombay in Criminal Writ Petition No. 1167 of 2006.

3. Accused No.1-M/s. Goodvalue Marketing Co. Ltd., a company registered and incorporated under the Companies Act, 1956 and Accused No.2-Appellant herein were convicted for commission of an offence involving Section 138 of the Act by a judgment of conviction and sentence dated 23.2.2006 holding :

"The accused No.1 company M/s. Goodvalue Marketing Co. Ltd. stands convicted for the offence punishable under Section 138 r.w. 141 of Negotiable Instruments Act.

The accused No.1 company, is sentenced to pay a fine of Rs.25,000/- (Rupees Twenty Five Thousand only). In default of payment of fine, the accused No.2 Mr. Dilip Dahanukar, the Chairman of accused No.1 and representative at the trial, shall suffer S.I. for 1 month.

The accused No.2 Mr. Dilip S. Dahanukar, stands convicted for the offence punishable under Section 138 r.w. 141 of Negotiable Instruments Act, 1881.

The accused No.2 is sentenced to suffer S.I. for 1 month.

The accused No.2 is also directed to pay compensation to the complainant, quantified (sic) at Rs.15,00,000/- (Rupees Fifteen lakhs only), under Section 357(3) of Cr.P.C. The accused No.2 is entitled to pay the amount of compensation in two equal monthly instalments of Rs.7,50,000/- each. The first instalment of Rs.7,50,000/- shall be paid on or before 23-03-2006 and the second instalment of Rs.7,50,000/- shall be paid on or before 24-04-2006 in default of payment of the amount of compensation the accused No.2 shall suffer further S.I. for 2 month."

4. An appeal was preferred thereagainst. The Appellate Court by an order dated 27.4.2006 while admitting the appeal, directed them to deposit a sum of Rs. 5 lakhs each within four weeks from the said date. A writ petition was filed by the appellants questioning the legality of the said order which by reason of the impugned judgment has been dismissed.

5.Submissions of Mr. Subash Jha, learned Counsel appearing on behalf of the appellant are :

i) That having regard to the provisions of Section 357(2) of the Code, the impugned judgment is wholly unsustainable inasmuch as in terms thereof the amount of fine imposed would automatically be suspended.

ii) Right to prefer an appeal being a constitutional right in terms of Article 21 of the Constitution of India, no condition could have been imposed in respect therefor or for suspension of sentence.

6. Mr. Uday Umesh Lalit, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would submit that a distinction must be made between imposition of fine and application thereof, as contemplated under Clauses (a) to (d) of Sub-Section (1) of Section 357 and an amount of compensation directed to be paid under Section (3) thereof.

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11. A statute must be read harmoniously. An amount of compensation directed to be paid may not form part of a fine. It may be awarded separately. It may be recoverable as if it is a fine in terms of Section 431 of the Code but by reason thereof it would not become automatically recoverable forthwith. The legal position, however, must be considered keeping in view the purport and object of the Act.

12. An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for under Section 374 of the Code. Right of Appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a Fundamental Right. Right of Appeal, thus, can neither be interfered with or impaired, nor it can be subjected to any condition.

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25. Although the right of appeal being a vested right cannot be taken away, we must also notice that right of the Court cannot be taken away to suspend the sentence and such a provision would be ultra vires. It was so held in Dadu alias Tulsidas vs. State of Maharashtra [(2000) 8 SCC 437].

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32. If, therefore, under sub-Section (2) of Section 357, realization of fine, at least in respect of the factor(s) enumerated in clause (1) of sub-Section to be stayed automatically, we see no reason as to why the legislative intent cannot be held to apply in relation to amount of compensation directed to be paid in terms of sub-Section (3).

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35. It is, therefore, seen that consideration for payment of compensation is somewhat different from payment of fine. It is, to the said extent applied differently. As would be noticed a little later, it is necessary to probe into the capacity of the accused to pay the amount and the purpose for which it is directed to be paid.

39. If a fine is to be imposed under the Act, the amount of which in the opinion of the Parliament would be more than sufficient to compensate the complainant; can it be said, that an unreasonable amount should be directed to be paid by the Court while exercising its power under sub-Section (3) of Section 357? The answer thereto must be rendered in the negative. Sub- Section (5) of Section 357 also provides for some guidelines. Ordinarily, it should be lesser than the amount which can be granted by a Civil Court upon appreciation of the evidence brought before it for losses which might have reasonably been suffered by the plaintiff. Jurisdiction of the Civil Court, in this behalf, for realization of the amount in question must also be borne in mind. A criminal case is not a substitution for a civil suit, far less execution of a decree which may be passed.

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43 It does not appeal to us that although a compensation payable out of the quantum of fine would remain stayed under sub-Section (2) of Section 357 of the Code, if a compensation is directed to be

paid under sub-Section (3) thereof, the same would not attract the said provision. [See P. Suresh Kumar v. R. Shankar, 2007 (4) SCALE 143]

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51 This Court in an appropriate case may have to consider as to whether in economic offence like Negotiable Instruments Act, the Courts should at all invoke sub-Section (3) of Section 357 of the Code, when the purpose can be achieved by taking recourse to substantive provision of Section 138 of the Act read with Section 357(1) thereof. We, however, do not intend to lay down any law in this behalf, as at present advised, as we are not concerned herein with such a situation.

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53 If realization of an amount of compensation payable to a victim as envisaged under Clause (d) of sub-Section (1) of Section 357 is to be stayed under sub-Section (2) thereof, there is no reason why the amount of compensation payable in terms of sub-Section (3) shall not receive the same treatment.

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57. Unfortunately, the Legislature has not made any express provision in this behalf. In absence of any express provision, the question must be considered having regard to the overall object of a statute. We have noticed hereinbefore that Article 21 of the Constitution of India read with Section 374 of CrI.P.C. confers a right of appeal. Such a right is an absolute one. In a case where a judgment of conviction has been awarded, the Court can release a person on bail having regard to the nature of offence but as also the other relevant factors including its effect on society. A person upon arrest may have to remain in jail as an under trial prisoner. So would a person upon conviction. A person may also have to remain in jail, in the event he defaults in payment of fine, if he is so directed. But when a direction is issued for payment of compensation, having regard to Sub-Section (2) of Section 357 of the Code, the application thereof should ordinarily be directed to be stayed. It will, therefore, be for the Court to stay the operation of that part of the judgment whereby and whereunder compensation has been directed to be paid, which would necessarily mean that some conditions therefor may also be imposed. A fortiori a part of

the amount of compensation may be directed to be deposited, but the same must be a reasonable amount.

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61. While the Court shall give due weight to the need of the victim, it cannot ignore the right of an accused. In a case of conflict, construction which favours the accused shall prevail.

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73. We are of the opinion that having regard to the aforementioned factors the amount of compensation not only must be reasonable one, the conditions for suspending the sentence should also be reasonable. It is only with that intent in view, the doctrine of purposive construction should be applied.

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75. We are prima facie of the opinion (without going into the merit of the appeal) that the direction of the learned Trial Judge appears to be somewhat unreasonable. Appellant herein has been sentenced to imprisonment. Only fine has been imposed on the Company. Thus, for all intent and purpose, the learned Trial Judge has invoked both Sub-sections (1) and (3) of Section 357 of the Code. The liability of the appellant herein was a vicarious one in terms of Section 141 of the Negotiable Instruments Act. The question may also have to be considered from the angle that the learned Trial Judge thought it fit to impose a fine of Rs. 25,000/- only upon the Company. If that be so, a question would arise as to whether an amount of compensation for a sum of Rs. 15 lakhs should have been directed to be paid by the Chairman of the Company. We feel that it is not.

We, therefore, are of the opinion :

- i) In a case of this nature, Sub-Section (2) of Section 357 of the Code of Criminal Procedure would be attracted even when Appellant was directed to pay compensation;
- ii) The Appellate Court, however, while suspending the sentence, was entitled to put the appellant on terms. However, no such term could be put as a condition precedent for entertaining the appeal which is a constitutional and statutory right;
- iii) The amount of compensation must be a reasonable sum;
- iv) The Court, while fixing such amount, must have regard to all

relevant factors including the one referred to in Sub-Section (5) of 357 of the Code of Criminal Procedure;

v) No unreasonable amount of compensation can be directed to be paid.”

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A clear finding has been given in the above judgment that even compensation imposed under Section 357(3) Cr. P.C. would be subject to the provision of Section 357 (2) Cr. P.C. It has also been held that the right of appeal of an accused person cannot be curtailed in any manner. However, in the final analysis, it has been held that a condition may be imposed while suspending his sentence but the said condition should not be unreasonable. There should be a determination of the condition being imposed based upon the capability and resources of the accused. Under these circumstances, it was held that a condition of depositing of a Rs. 1 lakh was reasonable.

In view of the above interpretation, the order dated 12.03.2018 is not sustainable in law? In my opinion it cannot be sustained. The Hon'ble Supreme Court in *Dilip S. Dahanukar's case (supra)* has in certain term held that Section 357(2) Cr. P.C. would also govern the cases of grant of compensation under Section 357(3) Cr. P.C. Finding had also been given that the compensation awardable is to set of any loss or injury caused on account of commission of the offence and that ordinarily such a compensation would be awardable by a Civil Court on the basis of evidence produced before it. While suspending the sentence of an accused person the Appellate Court is not possessed of any knowledge regarding his means or capability and therefore imposition of a condition of depositing an amount of money subject to which the sentence is suspended, would normally be arbitrary. In the facts and circumstances of the present case, the imposition

of the condition of deposit of ₹3.75 lacs is totally arbitrary and reasonableness of determination of the said amount is not turned out from the record.

Reference may also be made to a judgment of the Supreme Court in Satyendra Kumar Mehra vs. State of Jharkhand, 2018(2) RCR (Criminal) 530. The appellant therein had filed an appeal against his conviction and sentence before the High Court. An application for suspension of sentence was also filed. While suspending the sentence, the High Court directed him to deposit the fine amount before the trial Court. The Supreme Court was approached due to the direction of deposit of fine. After examining Section 357 Cr.P.C., it was held that sub-Section(2) thereof only barred the application of fine for purposes of compensation. The judgment in ***Dilip S. Dahanukar's case (supra)*** was also examined and it was held that the said judgment did not deal with the issue of deposit of fine as the question involved in the said case was regarding payment of compensation awarded in exercise of powers under Section 357(3) Cr.P.C.. Thus, the said case was distinguished.

The petition is thus, allowed and the condition of deposit of ₹ 3.75 lacs by way of demand draft/FDR/Bank guarantee is set aside.

Copy of this order be sent to the Sessions Judge, Faridabad, for compliance.

(SUDHIR MITTAL)
JUDGE

September 19, 2018
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Whether speaking/reasoned
Whether reportable

Yes
Yes