

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1985 OF 2019
WITH
CRIMINAL REVISION APPLICATION NO.368 of 2019
WITH
CRI.APPLN.NO.4216/19 IN CRI.REVN.368/2019

1. Monika Sales Agencies
(A Partnership firm through
its partner – Sunil Lalchand
Munot, Age 52 Yrs.,
occ. Business.
2. Sunil Lalchand Munot
Age: 52 Yrs., occu. Business
R/o Sadar Bazar, Camp, Bhingar
Dist. Ahmednagar = PETITIONERS

VERSUS

Mahesh Nagari Sah. Patsanstha Ltd.
Bhingar, Through Authorized person
Sanjay Shantilal Munot, Age: 40 Yrs.
Occ. Service, R/o Sadar Bazar,
Camp, Bhingar Dist. Ahmednagar = RESPONDENT

Mr.PK Lakhotiya, Adv. h/for Mr. Raviraj R.Chandak,
Advocate for Petitioner/s;

Mr.NV Gavare, Advocate for Respondent.

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 12th June, 2020.

JUDGMENT

1. Rule. Rule is made returnable forthwith
with consent of learned Advocate appearing for the
respective parties.

2. Both these proceedings, i.e. criminal writ petition as well as criminal revision, are arising between the same parties and the original proceeding between them was also one, though the learned Appellate Court as well as Revisional Court has delivered two different judgments; yet in order to avoid repetitions, the writ petition and the revision are proposed to be heard together and disposed off by a common judgment.

3. Before proceeding, at the outset, it is once again required to be observed by this court that the approach of judicial officers, in delivering two separate or different judgments, though they arise out of the same judgment and order, is required to be deprecated.

4. In the present case, the respondent had filed a complaint on 10.7.2003 for the offence punishable under Section 138 of the Negotiable Instruments Act bearing Summary Criminal Case No.221/2003 and it came to be decided by learned Judicial Magistrate, First Class, Court No.2, Ahmednagar on 22.3.2018. The accused was convicted

and then he filed Criminal Appeal No.82/2018 before the Sessions Court, Ahmednagar to challenge the conviction; whereas Criminal revision No.85/2018 was filed by original complainant for enhancement. The criminal appeal as well as criminal revision were decided by the same Presiding Officer on 25.11.2019. However, as aforesaid, two different judgments have been delivered by him.

. It is to be noted that the learned Additional Sessions Judge, while passing separate judgments in Criminal Revision, has stated that, "Both the appeal and the revision are decided at one and the same time. The reasons assigned in the appeal, while dismissing the said appeal, are the same reasons for allowing present revision application. Since, both the proceedings are distinct and filed under different two provisions, the jurisdiction was required to be exercised distinctly and, therefore, both are not decided by common judgment." These observations or the reasons assigned for delivering two different judgments are not based on sound legal provisions/propositions. Though jurisdiction to be exercised by the concerned court was distinct; yet

one proceeding has bearing over the other and they both were either inter-connected or inter-mingled and, therefore, there ought not to have been separate judgments. Inconvenience to the parties as well as from the point of judicial propriety also, such practice deserves to be deprecated.

5. It will not be out of place to refer to some of the observations, that have been made by this Court, deprecating such practice, in a civil matter, i.e. Second Appeal No.153/2017 with SA No. 154/2017 decided on 13.8.2019 – Vikas Shivdas Patil Vs. Sow. Gitanjali Vikas Patil. The said observations read thus, :

“.....Though both the matters were between the same parties, wife had filed petition for restitution of conjugal rights whereas husband was asking divorce. Both the Courts below ought to have given a common Judgment so as to avoid any contrary observations, so also to have a compact view of the dispute between the parties and the adjudication thereof. It would be a harsh statement to make, but it has to be made just to get some disposal units, if such practice is adopted then it is deprecable. The parties approaching the Court should get clear idea as to why their petition/ petitions have been either allowed or rejected and when the evidence has been led in one of the matters only, then just by taking a pursis in another matter, it is not appropriate on the part of the trial Court to pronounce a total separate Judgments in order to create any confusion. Here in this case trial Court in both the matters had given the

Judgment on the same day in both the matters when in fact a common Judgment could have been given. Points for consideration in such matters would be overlapping and under such circumstance a common Judgment ought to have been given. Same happened at the stage of appeal also, therefore at the cost of repetition it can be said that, if such practice is adopted, just to get more disposal units then it is required to be deprecated.

Though this Court in a civil matter has observed as above; yet that is applicable to the criminal cases also.

6. At the cost of repetitions, it is reiterated that, judicial officers, only to get more disposal norms, should not resort to such kind of practice, which will jeopardize the rights and remedies of the parties.

7. The facts, giving rise to the writ petition as well as the revision before this court are that: Present respondent, as aforesaid, had filed SCC No.221/2003 against the present petitioners. It was contended by the complainant-cooperative society that, accused No.1, which is a partnership firm, of which, accused No.2 is a

partner, had taken loan on cash credit facility on 27.2.2001 to the tune of Rs.11,50,000/-. The accused have executed necessary documents in favour of the complainant-society. When the society demanded its outstanding loan amount, at that time, accused No.2, in the capacity as partner of accused No.1-firm, gave cheque bearing No.021068 on 26.3.2003 for an amount of Rs.13,76,188/-. The said cheque was dishonoured and, therefore, the complainant issued notice on 8.4.2003. When the said notice was received by accused No.2, he came to the complainant once again and by settling the account, he gave another cheque which was account payee cheque, drawn on Nagar Urban Co-operative Bank Ltd., Ahmednagar, bearing No.021067 for Rs. 14,40,662/- dated 2.6.2003. When it was presented by the complainant with its banker – The Ahmednagar Merchants Co-operative Bank Ltd., Ahmednagar, Market Yard branch, it was dishonoured on the ground "Refer to Drawer". This fact was again informed by the complainant in writing on 3.6.2003 and legal notice through advocate was issued on 18.6.2003. It was received by the accused on 19.6.2003. In spite of receipt of the notice, it was not complied with

and, therefore, the complaint was lodged by the complainant-society on 10.7.2003.

8. After accused appeared, in response to the process issued, his plea was recorded at Exh. 16. He pleaded not guilty and, therefore, trial has been conducted. Taking into consideration the incriminating material, statement of the accused No.2 under Section 313 of Cr.P.C. was recorded. After hearing both sides and perusing the evidence on record, the learned Magistrate, by his judgment and order dated 22.3.2018, held the accused No.1 guilty for committing the offence punishable under Section 138 of the Negotiable Instruments Act. Accused No.2 was also held guilty for the said offence and was sentenced to suffer simple imprisonment for a period of two months and to pay fine of Rs.10,000/-, in default, to suffer simple imprisonment for one month.

9. As aforesaid, the said judgment and order passed by the learned Magistrate was challenged by original accused in Criminal Appeal No.82/2018; whereas the original complainant had challenged it

in criminal revision No.85/2018.

10. The learned Additional Sessions Judge, Ahmednagar heard both the matters together, however, delivered two separate judgments on the same date, i.e. 25.11.2019. He dismissed the criminal appeal and passed following order, -

"1. Appeal is dismissed.

2. The conviction order dated 22.3.2018 passed by learned Judicial Magistrate, First Class, Ahmednagar in SCC No. 221/2013 is maintained.

3. Issue memorandum accordingly.

4. The Record and Proceeding be sent to the learned Judicial Magistrate First Class, Ahmednagar along with copy of this judgment."

Further, in Criminal Revision No.85/2018, following order is passed by the learned Additional Sessions Judge,

"1. Revision is partly allowed.

2. The conviction order dated 22.3.2018 passed by the learned Judicial Magistrate, First Class, Ahmednagar in SC No. 221 of 2003 is quashed and set aside.

3. The SCC No. 221 of 2003 stands restored to the file of concerned learned Judicial Magistrate, First Class for passing the appropriate sentence in accordance with law.

4. The parties are directed to cause their appearance before concerned learned Judicial Magistrate First Class on

18.12.2019 without fail.

5. Inform the concerned learned Judicial Magistrate accordingly."

Against the aforesaid two orders, the writ petition as well as the Criminal revision are filed by the original accused. The Writ Petition challenges the judgment and order passed in Criminal Revision No. 85/2018; whereas the criminal revision filed under Section 397 and 401 of Cr.P.C. questioning the judgment and order passed in Criminal Appeal No. 82/2018.

11. Heard learned Advocates appearing for the respective parties.

12. It has been vehemently submitted on behalf of learned Advocate Shri PK Lakhotiya that, it appears from both the judgments that the learned Additional Sessions Judge was under confusion as to what he should do. At the first place, he dismissed the appeal and it is also mentioned that the conviction order is maintained; yet in revision, he has allowed it and restored the complaint on the file of the learned Magistrate for passing appropriate sentence. He could not have

taken both these actions simultaneously. In appeal, the learned Additional Sessions Judge, while reiterating that the accused has committed the offence punishable under Section 138 of the Negotiable Instruments Act, upheld the conviction. But then he says that the learned Magistrate patently erred while imposing the sentence, more particularly inadequate quantum of compensation. If he wanted to adopt such kind of approach, then the course that was open was different and not dismissal of the appeal. The matter cannot be remitted only to award adequate sentence. The learned Additional Sessions Judge himself has observed in the revision that, since the revision is invoked under Section 397 of Cr.P.C. for enhancement of the sentence, the scope is limited. It is also observed that the Court being the Court of revision, cannot alter or modify the sentence. If he could not have modified the sentence, then he ought to have dismissed the revision. But, in any manner, he could not have adopted both the options, i.e. dismissing the appeal filed by the accused and at the same time by allowing the revision, restoring back the complaint on the file of the

learned Magistrate.

13. It will not be out of place to mention here that the learned Advocate Mr.Lakhotiya submitted that the matter deserves to be sent back to the learned Additional Sessions Judge for adopting a proper course and in that case, he may not make submissions on merits of the case. He, therefore, basically prayed for remanding the matters with directions that the learned Additional Sessions Judge to decide both the matters together.

14. Learned Advocate for sole respondent supported the reasons assigned by learned Additional Sessions Judge and submitted that what has been held in the appeal is that confirming the finding given by the learned Magistrate that the accused has committed the offence punishable under Section 138 of the Negotiable Instruments Act and thereby he says that the conviction is confirmed. In other words, he has confirmed the finding of the learned trial Judge that the accused is guilty, but he has not confirmed the sentence that has been awarded and, therefore, by way of revision, the

matter has been sent back for pronouncement of the appropriate sentence. There is absolutely no necessity to remand the matter and on merits of the case also, the complainant has a good case, as the disputed cheque, issued by the accused in discharge of legally enforceable debt or liability has been dishonoured, and in spite of receipt of the notice, the accused has failed to make payment of the amount under the cheque.

15. In the instant matter, the first point, that is required to be decided is, as to whether the matters deserve to be remanded, taking into consideration the aforesaid facts. It will not be out of place to mention here that the matters before the learned Additional Sessions Judge were to challenge the finding regarding guilt of the accused as well as the sentence. The learned Additional Sessions Judge ought not to have segregated these two parts; once the appeal is dismissed and the conviction by the learned Magistrate is maintained. As per the operative order passed in criminal appeal No.82/2018, the effect of the same is that the proceedings in

respect of Summary Criminal Case before the Magistrate has come to an end. It could not have been re-opened for whatever reason, by remitting the matter back to the learned Magistrate for awarding adequate sentence. This court need not go into the aspect as to what remedy was available to the complainant to challenge inadequacy of the sentence. However, he had invoked the jurisdiction of learned Additional Sessions Judge under Section 397 of Cr.P.C. Therefore, when the substantive appeal filed by the accused was dismissed and then it is held that the conviction is maintained; the learned Additional Sessions Judge ought to have seen the consequence of the same and could not have remitted the matter back for passing adequate sentence by the Magistrate.

16. The another circumstance is now then required to be considered is, effect and consequence of these orders. If, pursuant to the order passed in the revision, the learned Magistrate enhances the sentence in the said criminal case No.221/20003 and the accused intends to challenge the same; then whether any remedy is

left to the accused, is a question, because he has already exhausted his remedy to challenge his conviction in the appeal. For the enhanced sentence what would be then remedy available to the accused is a question and, therefore, these consequences ought to have been taken into consideration by the learned Additional Sessions Judge.

17. The further fact to be noted from the judgment and order passed in Criminal Revision No. 85/2018 is, that the learned Additional Sessions Judge has not read the conviction that has been awarded by the learned Magistrate properly. The learned Magistrate, while convicting the accused No.2, apart from the simple imprisonment, had imposed fine of Rs.10,000/-. There is absolutely no mention about giving that amount, recovered as fine, as compensation to the complainant. In the revision petition filed by the complainant, following prayer has been made, -

"This revision petition may pleased be allowed And the order of conviction may pleased be modified by awarding fine of double the amount of cheque and imprisonment of 2 years. So also the

amount of cheque may please be order to be paid to the complainant as compensation out of fine amount."

Yet, in para No.6 of the judgment, the learned Additional Sessions Judge has observed that the said society filed present revision application precisely for enhancement of compensation. The amount under the said cheque is of Rs.14,40,662/-; whereas the learned Magistrate was pleased to award just **"compensation of Rs.10,000/- to the said society."** Further, the said fact is again repeated that the Magistrate has awarded compensation of Rs. 10,000/- only. Therefore, it appears that the learned Additional Sessions Judge, while making observations in respect of enhancement of the compensation, forgot to see that there was no order of compensation at all by the learned Magistrate which could be enhanced. The enhancement pre-supposes awarding of some amount as compensation. In fact, there ought to have been, in such circumstance, a discussion as to whether awarding of compensation is necessary or not, as compensation can be awarded under Section 357(1) or 357(3) of Cr.P.C. If the compensation is to be awarded under Section 357(1) of Cr.P.C., then it

should be from the fine amount and if it is to be in view of Section 357(3) of Cr.P.C., then fine should not be part of sentence. Further, the entire provision of Section 357 of Cr.P.C. is discretionary and, therefore, there ought to have been an endeavour in the judgment to state as to why the sentence is inadequate. The scope of the revision petition has been then restricted by the learned Additional Sessions Judge for enhancement of compensation only as it appears. Therefore, it will have to be stated that there was no proper application of mind by the learned Additional Sessions Judge and all the requisite factors, which are required to be considered to see whether the sentence that has been awarded is adequate or not, have not been considered at all.

18. When such conflicting judgments are delivered, the only course that is left with this court is to set aside both the judgments and orders passed by the learned Additional sessions Judge and remit the matters to him for deciding them in accordance with law. This court refrains itself, in view of the fact that the matters are required

to be remanded, from considering the merits of the present cases.

19. In view of the foregoing discussion, following order is passed, -

ORDER

i. The Judgment and Order dated 25.11.2019 passed by learned Additional Sessions Judge, Ahmednagar in Criminal Revision No.85/2018 and in Criminal Appeal No.82/2018, are hereby set aside;

ii. Both the proceedings are restored on the file of learned Additional Sessions Judge, Ahmednagar. The learned Additional Sessions Judge, Ahmednagar to decide both the proceedings in accordance with law.

iii. The parties to both the proceedings shall appear before the learned Additional Sessions Judge on 1st July, 2020. After appearance of the appellant-original accused, he should furnish bail before the learned Sessions Judge to the satisfaction of the said

court.

iv. The Criminal Writ Petition as well as Criminal Revision stand partly allowed and disposed of in the aforesaid terms. Pending criminal application, if any, stands disposed of.

(SMT. VIBHA KANKANWADI,J.)

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