

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.357 of 2013**

Atharva Agro Chemical Pvt. Ltd., Through Murari Lal Agrawal,
Director and Partner of the firm, S/o Late Babulal Agrawal, Aged
about 40 years, R/o Sirsa Road, Kohka, Bhilai, P.S. Supela,
Tahsil & Distt. Durg (C.G.)

(Complainant)
---- Petitioner

Versus

1. Gopal Chand Barik, S/o Shri Mohan Barik, Aged about 39 years,
Parvati Seed Stores, Gandhi Chowk, Proprietor of Jajpur, R/o
State Bank Road, Gandhi Chowk, Jajpur Town, Distt. Jajpur
(Orissa), Pin-755001

(Accused)

2. State of Chhattisgarh, Through District Magistrate, Durg (C.G.)
---- Respondents

AND**Criminal Revision No.233 of 2013**

Atharva Agro Chemical Pvt. Ltd., Through Murari Lal Agrawal,
Director and Partner of the firm, S/o Late Babulal Agrawal, Aged
about 40 years, R/o Sirsa Road, Kohka, Bhilai, P.S. Supela,
Tahsil & Distt. Durg (C.G.)

(Complainant)
---- Applicant

Versus

1. Gopal Chand Barik, S/o Shri Mohan Barik, Aged about 39 years,
Parvati Seed Stores, Gandhi Chowk, Proprietor of Jajpur, R/o
State Bank Road, Gandhi Chowk, Jajpur Town, Distt. Jajpur
(Orissa), Pin-755001

(Accused)

2. State of Chhattisgarh, Through District Magistrate, Durg (C.G.)
---- Non-applicants

For Petitioner / Complainant: -

Mr. P.R. Patankar, Advocate.

For Respondent No.1 / Accused: -

Mr. Amiyakant Tiwari & Ms. Swati Verma, Advocates.

For Respondent No.2 / State: -

Mr. Suyash Dhar, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

04/02/2021

1. Since common question of fact and law is involved in both the petitions, they are heard together and being disposed of by this common order.
2. Respondent No.1 / accused issued a cheque of ₹ 2,67,011/- to the complainant / petitioner on 3-4-2011 which was submitted by the petitioner / complainant in his bank for realisation, but the same was returned by the Bank informing that the cheque has been dishonoured on account of insufficient fund. Thereafter, legal notice was served by the complainant to the accused on 30-4-2011 and criminal complaint was filed for offence under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') before the trial Magistrate. The trial Magistrate upon full trial by his judgment dated 4-8-2012 found the offence under Section 138 of the NI Act proved against the accused / respondent No.1 and convicted him under Section 138 and sentenced to undergo RI for three months. Feeling aggrieved against the judgment of conviction and order of sentence awarded, the accused preferred criminal appeal under Section 374(3) of the CrPC, whereas, the complainant preferred criminal revision against the order not awarding compensation amount / fine to the accused. The revisional Court dismissed the revision of the complainant / petitioner holding that he could have invoked the remedy of appeal under Section 372 of the CrPC against which the present Cr.M.P. No.357/2013 has been filed by the complainant / petitioner. However, the appellate Court in

appeal under Section 374(3) of the CrPC maintained conviction of the accused / respondent No.1, but set aside the sentence of imprisonment and sentenced only to pay fine of ₹ 5,000/-, in default to undergo imprisonment for one month, against which the present revision Cr.Rev. No.233/2013 has been preferred by the complainant. This is how both the cases have been placed for consideration.

3. Mr. P.R. Patankar, learned counsel appearing for the petitioner herein / complainant, would submit that once conviction has been maintained for offence under Section 138 of the NI Act by the appellate Court, sentence could not have been interfered with or even if it has been interfered, it could have been awarded sentence of fine to the extent of the cheque amount or double of the cheque amount whichever is reasonable, but the appellate Court interfered with sentence and confined the sentence to fine amount that too ₹ 5,000/- only which is absolutely unjustified and bad in law. He would further submit that the revision preferred by the complainant was so competent which has also been illegally rejected by the revisional Court. As such, the present criminal revision be allowed and the sentence awarded by the trial Court be restored or it be converted to fine and compensation be awarded to the complainant.
4. Mr. Amiyakant Tiwari, learned counsel appearing for the accused / respondent No.1 herein, would vehemently submit that the learned appellate Court has rightly interfered with the sentence and sentenced to fine only which the accused had already deposited, as such, interference cannot be made in the

order of the appellate Court. He would further submit that the learned appellate Court has rightly set aside the jail sentence and converted it to fine sentence.

5. I have heard learned counsel for the parties and perused the judgment of the trial Court as well as of the appellate Court and the revisional Court and also went through the record with utmost circumspection.

Cr.Rev.No.233/2013

6. Section 138 of the NI Act provides as under:—

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that banker, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the

cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

7. By virtue of Section 138 of the NI Act, the Criminal Court after convicting the accused has to impose punishment of imprisonment, which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.
8. In the matter of **State of Maharashtra v. Jugamander Lal**¹, their Lordships of the Supreme Court have held that, expression 'shall be punishable for imprisonment and also for the fine', means that the Court is bound to impose a sentence comprising both imprisonment and fine.
9. Furthermore, their Lordships of the Supreme Court in the matter of **The Assistant Commissioner, Assessment-II, Bangalore and others v. M/s. Velliappa Textiles Ltd. and another**² have held as under:—

"35. ... Where the legislature has granted discretion to the court in the matter of sentencing, it is open to the court to use its discretion. Where, however, the legislature, for reasons of policy, has done away with this discretion, it is not open to the court to impose only a part of the sentence prescribed by the legislature, for that would amount re-writing the provisions of the statute."

10. Here in the instant case, in Section 138 of the NI Act the word "or" has been employed and discretion has been conferred to the Criminal Court sentencing the convicted person for offence under Section 138 of the NI Act. Thus, there is a discretion left

1 AIR 1966 SC 940

2 (2003) 11 SCC 405

with the Criminal Court dealing with complaint under Section 138 of the NI Act either to sentence the accused with imprisonment or to punish the accused with the sentence of fine upon considering the facts and circumstances of the case.

11. In the matter of Damodar S. Prabhu v. Sayed Babalal H.³, their Lordships of the Supreme Court while examining the object sought to be achieved by provisions of Section 138 of the NI Act and purpose underlying the punishment provided therein have held that Section 138 of the NI Act cases are meant to secure payment of money by holding as under:—

"17. Unlike that for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque."

12. In the matter of Somnath Sarkar v. Utpal Basu Mallick and another⁴, their Lordships of the Supreme Court while considering the punishment to be imposed under Section 138 of the NI Act have held in no uncertain terms that under Section 138 of the NI Act, only fine sentence can be imposed by the Criminal Court and observed as under:—

"15. ... Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. Inasmuch as the High Court did so, it committed no jurisdictional error. ..."

13. Thus, from the provisions contained in Section 138 of the NI Act

3 (2010) 5 SCC 663

4 (2013) 16 SCC 465

and following the principles of law laid down by their Lordships of the Supreme Court in the aforesaid judgments (supra), it is quite vivid that Criminal Court sentencing the accused for commission of offence under Section 138 of the NI Act is competent to impose sentence of fine only as imposition of jail sentence is not mandatory as it is the discretion vested with the Criminal Court dealing with complaint under Section 138 of the NI Act either to impose jail sentence or sentence of fine only depending on the facts and circumstances of particular case.

14. Now, the question raised and to be considered in this revision is, whether the trial Court as well as the Court of Session is justified in not imposing compensation upon the accused / respondent No.1 under Section 357(1)(b) of the CrPC. In order to consider the said plea it would be appropriate to set out the provisions contained in the aforesaid provision:--

"357. Order to pay compensation.—(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a civil court;

(c)-(d) ** ** *

(2) ** ** *

(3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or

injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an appellate court or by the High Court or Court of Sessions when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."

15. The law with regard to grant of compensation under Section 357(3) of the CrPC in cases arising from Section 138 of the NI Act is well settled. The object of Section 138 of the NI Act appears to be punitive as well as compensatory in nature as it provides a single forum and single proceeding for enforcement in criminal liability (for dishonouring the cheque) and for enforcement of civil liability (for realization of cheque amount).

16. In the matter of Suganthi Suresh Kumar v. Jagdeeshan⁵, the Supreme Court while dealing with flea-bite sentence (imprisonment till rising of court and fine of ₹ 5,000/-) imposed under Section 138 of the NI Act, held that same is not justified when the amount (over 4 lakhs) had not been paid by accused to complainant during pendency of the case before trial court or High Court and observed as under: -

"12. The total amount covered by the cheques involved in the present two cases was Rs 4,50,000. There is no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial court or revision before the High Court or this Court. If the amounts had been paid to the complainant there perhaps would have been justification for imposing a flea-bite sentence as had been chosen by the trial court. But in a case where the amount covered by the cheque remained unpaid it

should be the lookout of the trial Magistrates that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light-heartedly. The very object of enactment of provisions like Section 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount at least during the pendency of the case.”

17. In the matter of **R. Vijayan v. Baby and another**⁶, their Lordships of the Supreme Court culled out the following principle contained in the provisions of Chapter-XVII of the Act, which states as under:--

“(i) The provision for levy of fine which is linked to the cheque amount and may extend to twice the amount of the cheque (Section 138) thereby rendering Section 357(3) virtually infructuous insofar as cheque dishonour cases are concerned.”

Their Lordships in the later part of judgment while considering the intention of legislature for enacting Section 138 of the NI Act, have held as under:—

"17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under Section 357(1) (b) of the Code. Though a complaint under Section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under Section 357(1)

(b) of the Code and the provision for compounding the offences under Section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary.

18. 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 up to 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.

19. We are conscious of the fact that proceedings

under Section 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 Section 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 the 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 Section 143(3) of the Act requiring the complaints in regard to cheque dishonour cases under Section 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.”

18. In the matter of Bir Singh v. Mukesh Kumar⁷, the Supreme Court following the principle of law laid down in R. Vijayan (supra), held that Section 138 of the NI Act is both punitive as well as compensatory and restitutive, and also provides for enforcement of civil liability for realisation of cheque amount. It was held as under: -

“25. In *R. Vijayan v. Baby*⁶ this Court observed that the object of Chapter XVII of the Negotiable Instruments Act is both punitive as also compensatory and restitutive. It provides a single forum and single proceeding for enforcement of criminal liability by reason of dishonour of cheque and for enforcement of

⁷ (2019) 4 SCC 197

the civil liability for realisation of the cheque amount, thereby obviating the need for the creditor to move two different fora for relief. This Court expressed its anguish that some Magistrates went by the traditional view, that the criminal proceedings were for imposing punishment and did not exercise discretion to direct payment of compensation, causing considerable difficulty to the complainant, as invariably the limitation for filing civil cases would expire by the time the criminal case was decided.”

Thereafter, while granting appeal and confirming conviction of the respondent therein, their Lordships of the Supreme Court sentenced him only to fine, which was enhanced to ₹ 16 lakhs and further directed the same to be paid as compensation to the complainant. It was held as under: -

“40. The appeals are allowed. The judgment⁸ and order of the High Court is set aside. The conviction of the respondent under Section 138 of the Negotiable Instruments Act is confirmed. However, the respondent-accused is sentenced only to fine, which is enhanced to Rs 16 lakhs and shall be paid as compensation to the appellant complainant. The fine shall be deposited in the trial court within eight weeks from the date, failing which the sentence of imprisonment of one year as imposed by the trial court shall revive. There shall be no order as to costs.”

19. Thus, it is quite vivid that under Section 138 of the NI Act, Criminal Court is competent to levy fine up to twice the cheque amount and direct payment of such amount as compensation by way of restitution in regard to the loss on account of dishonour of cheque under Section 357(1)(b) of the CrPC and as such, the power under Section 357(3) of the CrPC cannot be exercised by Criminal Court in the cheque dishonour cases.

20. Reverting to the facts of the present case in the light of the aforesaid position, it is quite vivid that the trial Magistrate has

convicted the accused / respondent No.1 under Section 138 of the NI Act and sentenced him to undergo RI for three months, but no fine was imposed, however, in appeal filed by the accused, the appellate Court maintained conviction, but reduced sentence to fine sentence only. Taking into consideration, the provisions contained in Section 138 of the NI Act in which punishment imposable is two years imprisonment or with fine which can be twice the amount of cheque and taking note of the law laid down by the Supreme Court noticed herein-above including the judgment in Bir Singh (supra) and other cases, punishment to be awarded in Section 138 of the NI Act cases are meant to ensure payment of money and threat of jail is only to ensure recovery and as such, imposition of jail sentence is not mandatory. In the considered opinion of this Court, ends of justice would be served if fine awarded ₹ 5,000/- is enhanced to ₹ 2,67,011/- and an additional amount of ₹ 25,000/- towards interest on the said amount is imposed. Accordingly, the accused / respondent No.1 is sentenced to pay fine of ₹ 2,67,011/- and ₹ 25,000/- which shall be paid as compensation to the complainant / petitioner under Section 357(1)(b) of the CrPC. It is stated at the Bar that respondent No.1 has deposited fine of ₹ 5,000/- in compliance of the order passed by the appellate Court. Remaining amount of compensation shall be deposited by respondent No.1 before the CCD of the concerned trial Court within a period of 45 days and shall be paid immediately to the complainant. If balance amount of fine is not deposited within the stipulated period, respondent No.1 shall undergo simple imprisonment for one month.

21. As a fallout and consequence of the aforesaid discussion, the criminal revision is allowed in part. Conviction of the accused / respondent No.1 under Section 138 of the NI Act is not under challenge, however, he is sentenced to pay fine of ₹ 2,67,011/- and ₹ 25,000/- with default stipulation as indicated herein-above which is payable to the petitioner / complainant under Section 357(1)(b) of the CrPC.

Cr.M.P.No.357/2013

22. Since the criminal revision has been allowed in part herein-above, this petition has become infructuous and it is accordingly dismissed as having become infructuous.

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition No.357 of 2013

Atharva Agro Chemical Pvt. Ltd.

Versus

Gopal Chand Barik and another

AND

Criminal Revision No.233 of 2013

Atharva Agro Chemical Pvt. Ltd.

Versus

Gopal Chand Barik and another

Head Note

Punishment to be awarded under Section 138 of the NI Act cases is meant to ensure payment of money and threat to jail is only to ensure recovery of cheque amount.

परक्राम्य लिखत अधिनियम के मामलों में, धारा 138 के अंतर्गत दिए जाने वाला दण्ड, रकम के भुगतान को सुनिश्चित करने के लिए है और जेल की धमकी केवल चेक राशि की वसूली सुनिश्चित करने हेतु है।