**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO. 269 OF 2018

Mohammed Abdul Waseem Abdul Quadar .. Applicant

Versus

Firoz Khan Bismillah Khan .. Respondent

Mr. Abhay D. Ostwal, Advocate i/by Mr. Kiran D. Jadhav and Mr. Vikram L. Bhange and Mr. Mohit Lalit Deode, Advocates for the Applicant.
Mr. A. D. Kasliwal, Advocate for Respondent.

CORAM : KISHORE C. SANT, J.

DATED : 13th SEPTEMBER, 2022.

PER COURT :-

1. Heard the learned advocates for both the sides. By consent of the parties taken up for final disposal.

2. At the outset, Mr. Ostwal, learned advocate for the applicant pointed out that there are concurrent findings recorded against his client holding him guilty for an offence punishable under Section 138 of the Negotiable Instruments Act. The conviction recorded and sentence awarded by the learned Judicial Magistrate First Class is maintained in the appeal. He states that in view of the fact that now the entire amount is deposited, this Court may consider this matter for final disposal.

3. From the record it is seen that, the respondent complainant had paid the amount to the applicant-accused for the purpose of sending his old age mother for pilgrimage. However, no arrangements could be made by the accused to arrange for the pilgrimage and for the reason the complainant insisted for return of the amount. The accused therefore, issued cheque of an amount of Rs. 2,14,000/- (Rs. Two Lakh Fourteen Thousand only), however, on presenting the cheque, the cheque came to be returned for the reason “funds insufficient”. The complainant issued notice and demanded the amount. In spite of issuance of notice and receipt of notice, the accused failed to make the payment of the cheque. Therefore, the complainant filed a complaint.

4. It is the contention of the learned advocate for the accused that no notice was served, but the Court has presumed the service of notice was effected. However, ultimately the learned Court of J.M.F.C. held the accused guilty for committing an offence punishable under Section 138 of Negotiable Instruments Act (for short “N. I. Act”). The accused was directed to pay the compensation of Rs. 2,50,000/- (Rs. Two Lakh Fifty Thousand only) to the complainant. The accused was sentenced to suffer rigorous imprisonment for one (01) year. The accused had filed an appeal in the Court of learned Sessions Judge, Aurangabad bearing Criminal Appeal No. 193/2016. The learned Sessions Judge,

Aurangabad by the impugned judgment and order dated 15.10.2018 was pleased to dismiss the appeal by confirming the order of conviction and sentence. It is this order which is impugned in the revision application.

5. This Court had issued notice to the respondent by order dated 25.10.2018. Considering the fact that the accused had deposited Rs. 1,00,000/- (Rs. One Lakh only) during the pendency of the appeal towards the condition for bail. This Court also had directed him to deposit further amount of Rs. 75,000/- (Rs. Seventy Five Thousand only) in this Court with some other conditions. It is seen from the record that the said amount was not deposited by the accused and this Court by taking cognizance of the fact that the condition was not complied, was further pleased to direct the accused to deposit further amount of Rs. 75,000/- (Rs. Seventy Five Thousand only) in this Court. Since the order suspending the sentence was cancelled because of non deposit of the amount, the accused was required to surrender to jail. Ultimately, in the submission of the learned advocate that the accused has undergone total period of 64 days i.e. from 11.06.2017 to 20.06.2017 for a period of 17 days after his appeal came to be dismissed and till he was released on bail and thereafter from 23.04.2019 till 13.06.2019 for a period of 47 days i.e after suspension order was recalled. It is observed by this Court that, the conduct of the

accused shows that he has not taken the order seriously. This Court had recorded in the order dated 04.06.2019 that initially the accused/applicant on his own had shown readiness to deposit an amount of Rs. 75,000/- (Rs. Seventy Five Thousand only). The application was however allowed and bail was granted by suspending the sentence. It is submitted that, thereafter an amount of Rs. 75,000/- (Rs. Seventy Five Thousand only) was paid. The last installment of an amount of Rs. 75,000/- (Rs. Seventy Five Thousand only) was paid after order dated 04.06.2019. The learned advocate in view of this fact now requested the learned advocate for the complainant to explore the possibility as to whether the offence can be compounded. The learned advocate submits that the complainant is however, not ready to compound the offence in spite of depositing the entire amount. He fairly submitted that he will not argue the matter on merit, but would only pray to reduce the sentence imposed upon the applicant to a sentence already undergone. He relied upon the judgments delivered by the Hon'ble Apex Court in the cases (i) **Meters and Instruments Private Limited and another Vs. Kanchan Mehta** reported in **(2018) 1 SCC 560** (ii) **P. Mohanraj and others Vs. Shah Brothers Ispat Private Limited** reported in **(2021) 6 SCC 258** (iii) **Damodar S. Prabhu Vs. Sayed Babalal H.** reported in **(2010) 5 SCC 663.**

6. Mr. Kasliwal, learned advocate for the respondent vehemently opposed the submission of the learned advocate for the accused. He pointed out from the conduct of the accused and submits that his conduct shows that he is not a person who deserves to be shown any sympathy. He further stated that the amount is not deposited by the accused on his own, but it is deposited only pursuant to the orders of this Court. There is no real desire to compound the offence. Even the accused has not obeyed the condition imposed by this Court. The condition was imposed on him on the basis of the statement which was voluntarily made by the accused. He stated that though the accused was in custody, it was because of his own conduct and because of not obeying the condition imposed by the Court and this need not be considered as a period undergone towards sentence. The learned counsel relies upon the judgment in the case of **Kishan Rao Vs. Shankargouda** reported in **2018 All SCR (Cri) 1197** and pointed out the limitations on this Court while exercising the powers under the revisional jurisdiction. He further pointed out that the amount of cheque was not out of any commercial transaction or towards any other transaction, but was an amount which the accused had collected for pilgrimage. The complainant wanted to send his mother for pilgrimage tour which is considered to be holy pilgrimage. Since, thereafter his mother could not ever go for pilgrimage and she has lost the chance

forever and this fact needs to be considered.

7. I have considered the submissions of both the learned advocates.

8. In the case of **Meters and Instruments Private Limited** (supra), the Hon’ble Apex Court in paragraph No. 7 has considered the object of the statute i.e. in N.I. Act which is to facilitate smooth functioning of business transactions. It is quoted as below.

> “7. This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors. Dishonour of cheque causes incalculable loss, injury and inconvenience to the payee and credibility of business transactions suffers a setback. At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 Amendment specifically made it compoundable. The offence was also described as ‘regulatory offence’. The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of “preponderance of probabilities”. The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation. Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to the both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover

interest and costs. Section 357(1)(b) of the Cr.P.C. provides for payment of compensation for the loss caused by the offence out of the fine. Where fine is not imposed, compensation can be awarded under Section 357(3) Cr.P.C. to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments."

9. The paragraph No. 12 of the said judgment reads as below.

> "12. The sentence prescribed under Section 138 of the Act is upto two years or with fine which may extend to twice the amount or with both. What needs to be noted is the fact that power under Section 357(3) Cr.P.C. to direct payment of compensation is in addition to the said prescribed sentence, if sentence of fine is not imposed. The amount of compensation can be fixed having regard to the extent of loss suffered by the action of the accused as assessed by the Court. The direction to pay compensation can be enforced by default sentence under Section 64 IPC and by recovery procedure prescribed under Section 431 Cr.P.C."

10. Thus, considering the object of the N.I. Act, it is clear that it is only a civil wrong which is made an offence for smooth functioning, or otherwise of the commercial transaction. The dishonour of cheque is considered to be an offence by legislative fiction. The paragraph No. 18.3 in a case of **Meters and Instruments Private Limited** (supra) which is quoted below for the ready reference.

> "18.3 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."

11. Thus, the Court in his discretion can close the proceeding and discharge the accused when the parties are not ready to go for compounding.

12. Mr. Kasliwal, learned advocate at this point states that this judgment needs to be considered when the parties are at the initial stage of the proceeding. In this case, now the accused has come forward to pay the amount only after he suffered two judgments against him and therefore, this judgment in this case, may not be applicable.

13. In the case of **P. Mohanraj and others** (supra), the learned advocate for the accused relied upon paragraph Nos. 44 and 45 to show that by deeming provision, the civil liability is now deemed to be an offence where transactions are of commercial transactions between the parties for a debt or liability. The paragraph Nos. 44 and 45 are quoted as below.

> "44. This brings us to the nature of proceedings under Chapter XVII of the Negotiable Instruments Act. Sections 138 to 142 of

the Negotiable Instruments Act were added by Chapter XVII by an Amendment Act of 1988. Section 138 reads as follows:

"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 honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with 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:

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.

Explanation.—For the purposes of this Section, "debt or other liability" means a legally enforceable debt or other liability."

45. Section 138 contains within it the ingredients of the offence made out. The deeming provision is important in that the legislature is cognizant of the fact that what is otherwise a civil liability is now also deemed to be an offence, since this liability is made punishable by law. It is important to note that the transaction spoken of is a commercial transaction between two parties which involves payment of money for a debt or liability. The Explanation to Section 138 makes it clear that such debt or other liability means a legally enforceable debt or other liability. Thus, a debt or other liability barred by the law of limitation would be outside the scope of Section 138. This, coupled with fine that may extend to twice the amount of the cheque that is payable as compensation to the aggrieved party to cover both the amount of the cheque and the interest and costs thereupon, would show that it is really a hybrid provision to enforce payment under a bounced cheque if it is otherwise enforceable in civil law. Further, though the ingredients of the offence are contained in the first part of Section 138 when the cheque is returned by the bank unpaid for the reasons given in the Section, the proviso gives an opportunity to the drawer of the cheque, stating that the drawer must fail to make payment of the amount within 15 days of the receipt of a notice, again making it clear that the real object of the provision is not to penalise the wrongdoer for an offence that is already made out, but to compensate the victim."

14. The learned advocate further relies upon paragraph Nos. 53 and 59 of the said judgment. The paragraph No. 59 is quoted below.

> "59. In Kaushalya Devi Massand v. Roopkishore Khore, a Division Bench of this Court succinctly stated: (SCC p. 595 para11)
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> "11. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones."
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> (This is the clearest enunciation of a Section 138 proceeding being a "civil sheep" in a "criminal wolf's" clothing.)"

15. The learned advocate further relied upon the judgment of the Hon'ble Apex Court in the case of **Damodar S. Prabhu** (supra) to show that when the offence is compounded condition of deposit of the amount of certain percentage of the cheque can be directed to be deposited depending upon the stage at which, the compounding is to be done. However, since in this case, it is not a case of compounding. This Court can at least take into consideration the factor that now the amount is deposited.

16. So far as the judgments relied upon by the learned advocate Mr. Kasliwal, he pointed out from the first judgment that it is not within the scope of this Court in exercising the powers of revision to reduce the sentence. Another judgment he relied upon is in respect of the proceeding arising out of Section 138 of the N.I. Act. In that case, the High Court had allowed the revision by setting aside the conviction order. From paragraph No. 13 it is seen that the Hon'ble Apex Court was pleased to hold that the High Court has set aside the order of conviction by substituting its own view and the same was set aside by the Hon'ble Apex Court holding that the High Court could not have substituted its own finding. In further paragraph in the same judgment it is observed that the High Court had not recorded any finding that the conviction was based on evidence on record suffers from perversity or based on no material or there is any other valid ground for exercise of revisional jurisdiction.

17. In this case, this Court is not setting aside the finding of conviction. It is true that this Court cannot set aside the conviction recorded by both the Courts below lightly while dealing with the revision application.

18. I have considered all the facts of the case and the submissions of the learned advocates.

19. It is true that the accused is found guilty of the offence punishable under Section 138 of the N.I. Act. His conviction is confirmed by the learned Sessions Court in the appeal. Further the conduct of the accused also shows that he has deposited the amount only under the orders of this Court. At no point of time he voluntarily approached the complainant with a proposal to compound the offence. It is for this reason and because of the sentiments attached of the complainant with the fact that his old age mother could not go for her pilgrimage, he states, that compounding is not possible and he prays to maintain the conviction and the sentence as it is.

20. The learned advocate Mr. Ostwal states that even the complainant has filed summary suit which is decreed in favour of the complainant. In Summary Civil Suit No. 75/2018 wherein, the accused is directed to pay an amount of Rs. 3,29,560/- (Rs. Three Lakh Twenty Nine Thousand Five Hundred Sixty Only) which decree is not even challenged. This is an additional factor which needs to be considered.

21. Considering the fact that now the accused has deposited an amount of Rs. 1,00,000/- (Rs. One Lakh only) which is lying in the learned Sessions Court, Aurangabad and remaining amount of Rs. 1,50,000/- (Rs. One Lakh Fifty Thousand only) is lying in this Court, this Court finds in the interest of justice to reduce the sentence

imposed upon the accused to the sentence already undergone and further finds it necessary to permit the complainant/respondent to withdraw the amount which is lying in this Court as well as in the learned Sessions Court as stated above. The learned advocate for the applicant/accused has no objection to withdrawal of the amount by the complainant. Hence, the order.

ORDER

(I) The Criminal Revision Application is partly allowed.

(II) The conviction of the applicant/accused imposed by the learned J.M.F.C. and affirmed by the learned Sessions Court in Criminal Appeal No. 193/2016 is maintained.

(III) The sentence of one (01) year of rigorous imprisonment is modified to the sentence already undergone.

(IV) The order directing to pay the compensation is maintained as it is. In addition to the amount, the applicant/accused to pay 15% of the cheque amount as he has consumed the time of the legal machinery. The said amount of 15% be paid in the account of High Court Legal Aid Committee as condition precedent.

(V) The respondent – original complainant to withdraw an amount of Rs. 1,50,000/- (Rs. One Lakh Fifty thousand only) deposited in this Court as per the orders of the Court in Criminal Revision Application No. 269/2018 and an amount of Rs. 1,00,000/- (Rs. One Lakh only) deposited in the Sessions Court in Criminal Appeal No. 193/2016. The original complainant to withdraw the amount with interest, if permissible.

(VI) Criminal Revision Application is disposed of accordingly.

(KISHORE C. SANT)
JUDGE

P.S.B.