

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 156 of 2019

Omkarnath Sahoo @ Omkernath Sahoo

Vs

The State of West Bengal & Anr.

For the Petitioner

: Mr. Debabrata Roy,
Ms. Srabani Mukhopadhyay,
Mr. Soumik Mondal,
Mr. Soura Sarkar.

For the State

: Mr. Joydeep Roy, Jr. Govt. Adv.
Ms. Sujata Das.

For the Opposite Party no. 2

: Mr. Ayan Basu,
Mr. Sourav Bera,
Mr. Sumit Routh.

Heard on

: 09.02.2023

Judgment on

: 03.03.2023

Shampa Dutt (Paul), J.:

The present revision has been preferred against an order and judgment dated 18.12.2018 passed by the Learned Sessions Judge, Purba Medinipur in connection with Criminal Appeal No.7/2018 affirming the conviction of the petitioner under Section 138 of the Negotiable Instrument Act and sentencing him to suffer simple imprisonment for two months and to pay a compensation of Rs.6,00,000/- to the Opposite Party No.2 within one month and in default of payment of compensation the petitioner shall have to undergo simple imprisonment for a period of one (1) year though the Learned Judicial Magistrate, 1st court, Tamluk, Purba Medinipur sentenced him to suffer simple imprisonment for two months and to pay a fine of Rs.5,000/- i.e. to suffer simple imprisonment for one month and directed payment of compensation of Rs.4,00,000/- to the Opposite Party No.2 within three months from the date of order by way of depositing the same with the judicial cashier of the court in default of which the Opposite Party No.2 would be at liberty to execute the order in terms of S.357 of the Code of Criminal procedure after a lapse of three months from the date of the order in connection with C.R. Case No.335/12 corresponding to T.R. No.263/12.

The petitioner states that the Opposite Party No.2 lodged a written complaint in the Court of the Learned Chief Judicial Magistrate,

Purba Medinipur on 16.07.2012 alleging inter alia that the opposite party no. 2 is a businessman having good acquaintance with the petitioner and on request gave him a loan of Rs. 3,60,000/- on 10.12.2011 and being assured that the petitioner would pay back the amount within a few months on demand the transaction took place on the basis of a verbal agreement and thereafter on request the petitioner gave the opposite party no.2 one account payee cheque bearing no. 862843 dated on 16.05.2012 for the entire amount of loan of Rs. 3,60,000/- drawn upon Punjab National Bank, Nonakuri Bazar Branch, Purba Medinipur.

The cheque was dishonoured on presentation and returned to the opposite party no. 2 on 31.05.2012 with the endorsement of "Insufficient Funds".

The Learned Judicial Magistrate, 1st Court, Tamluk by a judgment and order dated 16.05.2018 convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer Simple Imprisonment for one month and fine of Rs. 5000/- i.d. S.I. for one month and also to pay compensation of Rs. 4,00,000/- only within three months from the date of delivery of the judgment.

The Petitioner moved an appeal being Criminal Appeal No.7/2018 before the Court of the Learned Court of Sessions and on 18.12.2018 the Learned Sessions Judge, Purba Medinipur was pleased

to allow the appeal in part and directed the appellant to suffer simple imprisonment for two months but set aside the order of payment of fine and also directed the appellant to pay compensation of Rs. 6,00,000/- to the complainant within one month from the date of the order and in default of payment of compensation the convict/appellant shall have to undergo simple imprisonment for a period of one year.

Hence this revision.

Mr. Debabrata Roy, learned counsel for the petitioner has submitted that the judgment and order of conviction and sentence passed by the Learned Sessions Judge is illegal and erroneous in nature, is based on surmise and conjectures and is otherwise illegal, bad in law and is liable to be set aside.

That the findings/judgments/orders of the Learned Judicial Magistrate, Tamruk and the Learned Sessions Judge, Purba Medinipur being the appellate Court are otherwise bad in law and liable to be set aside.

The petitioner submits that the petitioner filed an appeal before the Learned Court of Sessions and the Learned Sessions Judge enhanced the compensation amount from Rs. 4,00,000/- to Rs. 6,00,000/- which is not in accordance with law and as such the judgment/order under revision is liable to be set aside.

Mr. Ayan Basu, learned counsel for the opposite party no. 2

has submitted that the learned session judge rightly enhanced the sentence and as such the revision is liable to be dismissed. The learned Magistrate erroneously imposed both fine and compensation and as such the Appellate Court rightly interfered with the order in accordance with law.

Heard the Learned Counsels for both sides. Perused the materials on record and the judgment/order under revision. Considered.

The relevant portion of the judgment under revision is as follows:-

“.....Keeping in view the provision of Section 357(3) of the Cr.P.C., I am of the firm view that it would be just and proper to set aside the order as regards payment of fine passed by the learned Magistrate. Considering the fact that the cheque amount is Rs. 3,60,000/- and the litigation is pending for more than six years, I do hold that the convict/appellant shall be directed to pay compensation of Rs. 6,00,000/- to the appellant, in default of payment of compensation the convict/appellant will have to undergo simple imprisonment for a period of six months.

The order passed by the learned Magistrate directing the convict/appellant to suffer simple imprisonment for two months is affirmed. The order passed by the learned Magistrate directing the convict/appellant to pay a fine of Rs. 5,000/- is hereby set aside.

The convict/appellant is directed to pay compensation of Rs. 6,00,000/- to the

complainant/respondent within one month from this date and in default of payment of compensation, the convict/appellant shall have to undergo simple imprisonment for a period of one year.”

Mr. Roy has relied upon the following judgments:-

1) Kalamani Tex and Anr. Vs P. Balasubramanian, Criminal

Appeal No. 123 of 2021, on February 10, 2021.

“19. As regards the claim of compensation raised on behalf of the respondent, we are conscious of the settled principles that the object of Chapter XVII of NIA is not only punitive but also compensatory and restitutive. The provisions of NIA envision a single window for criminal liability for dishonour of cheque as well as civil liability for realisation of the cheque amount. It is also well settled that there needs to be a consistent approach towards awarding compensation and unless there exist special circumstances, the courts should uniformly levy fine up to twice the cheque amount along with simple interest @ 9% p.a.”

2) Sahab Singh & Ors. vs State of Haryana, Criminal Appeal

No. 104 of 1990, on February 20, 1990.

3) Govind Ramji Jadhav vs The State of Maharashtra,

Criminal Appeal No. 197 of 1990, on March 7, 1990.

Mr. Basu has relied upon the following judgment:-

1) R. Vijayan vs Baby and Anr., Criminal Appeal No. 1902

of 2011, on October 11, 2011.

“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.”

The relevant provision of law in the present case is Section 386 Cr.P.C.

Section 386 of the Code of Criminal Procedure, lays down:-

“386. Power of the Appellate Court.- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law,

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which, in its opinion, the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

The judgment of the Supreme Court in **Kumar Ghimirey vs The State of Sikkim, Criminal Appeal No. 719 of 2019, on 22 April, 2019**, held:-

“13. In the case of Sahab Singh and others vs. State of Haryana, (1990) 2 SCC 385, also after considering the procedure prescribed by Cr.P.C. including Sections 386 and 401 High Court held that the High Court even if no appeal is filed by the State for enhancement of sentence can exercise suo motu power of revision under Section 397 read with Section 401 of Cr.P.C. but before the High Court can exercise its revisional jurisdiction to enhance the sentence, it is imperative that the convict is put on notice. In paragraph 4 this Court laid down following:

*"4. Section 374 of the Code of Criminal Procedure ('the Code' hereinafter) provides for appeals from conviction by a Sessions Judge or an Additional Sessions Judge to the High Court. Section 377 entitles the State Government to direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy. Sub section 3 of Section 377 says that when an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence **except after giving to the accused a reasonable opportunity of showing cause against such** enhancement and while showing cause the accused may plead for his acquittal or for the reduction of the sentence. Admittedly no appeal was preferred by the State Government against the sentence imposed by the High Court on the conviction of the appellants under Section 302/149, I.P.C. Section 378 provides for an appeal against an order of acquittal. Section 386 enumerates the powers of the appellate court. The first proviso to that section states that the sentence shall not be enhanced unless the*

accused has had an opportunity of showing cause against such enhancement. Section 397 confers revisional powers on the High Court as well as the Sessions Court. It, inter alia, provides that the High Court may call for and examine the record of any proceeding before any inferior criminal court situate within its jurisdiction for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any inferior court. Section 401 further provides that in the case of any proceedings, the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Sections 386, 389, 390 and 391 of the Code. Subsection 2 of Section 401 provides that no order under this Section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by Pleader in his own defence. Subsection 4 next provides that where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. It is clear from a conjoint reading of Section 377, 386, 397 and 401 that if the State Government is aggrieved about the inadequacy of the sentence it can prefer an appeal under Section 377(1) of the Code. The failure on the part of the State Government to prefer an appeal does not, however, preclude the High Court from exercising suo motu power of revision under Section 397 read with Section 401 of the Code since the High Court itself is empowered to call for the record of the proceeding of any court subordinate to it. Subsection 4 of Section 401 operates as a bar to the party which has a right to prefer an appeal but has failed to do so but that subsection cannot stand in the way of the High Court exercising revisional jurisdiction suo motu. But before the High Court exercises its suo motu revisional jurisdiction to enhance the sentence, **it is imperative that the convict is put on notice and is given an opportunity of being**

heard on the question of sentence either in person or through his advocate. The revisional jurisdiction cannot be exercised to the prejudice of the convict without putting him on guard that it is proposed to enhance the sentence imposed by the Trial Court.

14. The same proposition has been laid down in Govind Ramji Jadhav vs. State of Maharashtra, (1990) 4 SCC 718 and Surendra Singh Rautela @ Surendra Singh Bengali vs. State of Bihar (Now State of Jharkhand), (2002) 1 SCC 266.

In the present case, it is clear from the judgment under revision that the Sessions Court enhanced the sentence without complying with the mandatory provision of sec 386 CRPC and it's proviso.

It is evident that the session judge before proceeding to enhance the sentence should have issued notice to the convict giving him an opportunity of being heard on the question of enhancement of sentence.

Accordingly keeping with the view of the Supreme Court, and the relevant provision of law, the judgment under revision passed by the learned Sessions Judge, Purba Medinipur in connection with Criminal Appeal No. 7 of 2018 on 18.12.2018 is hereby set aside being not in accordance with law.

The matter is remitted to the court of Learned Sessions Judge, Purba Medinipur to hear the appeal afresh (Criminal Appeal

No. 7 of 2018) and dispose of the appeal by writing a fresh judgment in accordance with the observation of this Court in this judgment and order and dispose of the same preferably within three months from the date of communication of this order.

CRR 156 of 2019 is accordingly disposed of.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)