

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1431 of 2019

Somnath Chatterjee

Vs

Hossain Mallick

For the Petitioner : Mr. Kausik De,
Mr. Ayan Bhattacharya,
Ms. Kriti Majumder,
Ms. Mohini Majumder.

For the Opposite Party : None.

Heard on : 16.01.2023

Judgment on : 08.02.2023

Shampa Dutt (Paul), J.:

The present revision application is against an order dated March 13, 2019 passed by the learned Judicial Magistrate, 4th Court at Serampore in connection with C.R. Case No. 31 of 2018 under Section 138 of the Negotiable Instruments Act, 1881.

The petitioner states that on February 19, 2018, the opposite party herein filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “NI Act”) against the petitioner herein before the Court of the learned Additional Chief Judicial Magistrate at Serampore (hereinafter referred to as ‘learned ACJM’) on the allegations inter alia to the effect that the opposite party is a LIC agent who collected money from different Policy Holders and entrusted Rs. 60,00,000/- to the petitioner for depositing the same in SBI Life Corporate Policy subsequently the opposite party requested the petitioner to return such amount. The petitioner returned only Rs. 5 lakhs out of Rs. 60 lakhs and agreed to repay the balance sum of Rs. 55 lakhs later. The petitioner, subsequently, issued a Cheque bearing no. 065132 dated October 24, 2017 in discharge of such liability. The opposite party herein deposited the said cheque on December 29, 2017 which on being presentation stood dishonoured by Union Bank of India, Dankuni Branch on the reason “fund insufficient”. On January 16, 2018, the opposite party issued a Demand Notice under Section 138b of

the NI Act which was received by the petitioner on January 18, 2018. However, the said Notice yielded no fruitful result. The petitioner, according to the opposite party herein, has thus attracted the penal. Section 138 of the NI Act. Vide Order dated February 19, 2018, the learned ACJM was pleased to take purported cognizance and transferred the case to the Court of the learned Judicial Magistrate, 4th Court at Serampore. Vide order dated April 18, 2018, the learned Trial Magistrate was pleased to issue process in the nature of summons thereby fixing the next date on June 14, 2018. On June 14, 2018, since no requisite was filed by the opposite party, the case was adjourned till August 22, 2018. On August 23, 2018, the case records were put up (since August 22, 2018 was a holiday), when fresh notice was issued thereby fixing the next date on December 4, 2018. After receipt of the summons, the petitioner herein appeared before the learned Trial Magistrate when he was enlarged on bail. The learned Trial Magistrate vide Order dated December 4, 2018 was pleased to fix the case on January 19, 2019 for plea. That on March 13, 2019, the learned Trial Magistrate had purportedly examined the petitioner under Section 251 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'). The learned Trial Magistrate vide self same order was pleased to direct the petitioner to pay interim compensation to the opposite party to the tune of Rs. 11 lakhs (i.e. 20% of the claimed amount) within sixty days from the date of passing of the order.

Mr. Ayan Bhattacharya, the learned counsel for the petitioner has submitted that the order dated March 13, 2019 passed by the Learned Trial Magistrate is procedurally untenable and legally unsustainable.

The Order dated March 13, 2019 whereby and where under the Learned Trial Magistrate was pleased to take plea of the petitioner is bad in law.

That there was mechanical compliance of the provision of Section 251 of Cr.P.C. for which the petitioner claims prejudice.

The Learned Trial Magistrate has further erred in directing the petitioner to pay interim compensation in terms of Section 143-A of the NI Act which was inserted vide Negotiable Instruments (Amendment) Act, 2018 with effect from August 2, 2018 whereas the instant proceeding was instituted by filing the instant complaint of February 19, 2018.

On March 03, 2019 the Learned Trial Magistrate has erred in passing such order of interim compensation without affording sufficient opportunity of hearing to the petitioner.

Sec 143-A of the NI Act was not substantively made retrospective in operation.

The Learned Trial Magistrate has mechanically applied the said provision and imposed the highest amount without any consideration/reason.

That since the liability to pay interim compensation as imposed upon the petitioner by way of newly introduced provision is in the nature of legally enforceable liability, therefore, it is a new and substantive obligation as per the law and not merely a part of the procedure. As this new provision affects the substantive right of a litigant (petitioner), it cannot be applied to the pending cases by giving retrospective operation.

The provisions contained in the Negotiable Instruments (Amendment) Act, 2018 including Section 143-A of the NI Act thereof have validly come into operation on and from August 2, 2018 and therefore, the said enactment is not retrospective in operation.

That it is settled law that all substantive laws are prospective in operation unless otherwise prescribed. The provision of Section 143-A of the NI Act reveals that the enactment starts with a non-obstante clause. Hence, Section 143-A of the NI Act have to be read along with the relevant and applicable provisions of Cr. P.C. and not in isolation.

Section 143-A of the NI Act requires different consideration which primarily depends upon the factual matrix of the case. The

aforesaid enactment being of discretionary nature, such discretion has to be exercised judicially.

The Learned Trial Magistrate has mechanically invoked the provision of Section 143-A of the NI Act without proper consideration of the matter.

It is further submitted that the provision of Section 202 of Cr.P.C. has also not been complied though the said point has not been agitated in the revision application.

It is thus submitted that the order under revision being bad in law is thus liable to be set aside and quashed.

In the present case it is seen from the documents on record that the Petitioner/Accused is a resident of Howrah and the complainant is a resident of district Hooghly and the case has been initiated in Serampore Court, District Hooghly. The Petitioner/Accused resides beyond the jurisdiction of Serampore Court and the Magistrate was bound by law to comply with the provision of 202 Cr.P.C.

The Order of the Magistrate issuing process is as follows:-

C.R. No. 31/2018

Order dated 18.04.2018

The date is fixed for S/A.

The Complainant Mazaffar Hossain Mallick was examined initially on S.A. u/s 200 of Cr.P.C. Perused the written complaint on record. I also perused initial ejahar of complainant and found that deposition of no other witness preferred on S.A.

Considering all these, I am of opinion that there are sufficient materials which can be considered as sufficient ground for proceeding against the accused person u/s 138 of N.I. Act.

Accordingly issue summon to the accused person. Fix 14.06.2018 for S/R and appearance. Complainant is to file requisites at once.

D & C by me,

**J.M. 4th Court,
Serampore**

**Judicial Magistrate, 4th Court,
Serampore**

A Five Judge Bench of the Supreme Court in Re expeditious trial of cases under Section 138 of NI Act, 1881 on 16.04.2021, held:-

Para 12 “.....On a holistic reading of Section 145 along with Section 202, **we hold that** Section 202 (2) of the Code is inapplicable to complaints under Section 138 in respect of examination of witnesses on oath. The evidence of witnesses on behalf of the complainant shall be permitted on affidavit. If the Magistrate holds an inquiry himself, it is not compulsory that he should examine witnesses. In suitable cases, the Magistrate can examine documents for satisfaction as to the sufficiency of grounds for proceeding under Section 202.”

Thus the order of the magistrate issuing process in the present case is in accordance with the said judgment of the Supreme Court and Section 202 Cr. P.C. has been duly complied herein.

In spite of due service there is no representation on behalf of the opposite party.

Heard both sides in full. Perused the materials on record, including the orders under revision and the facts and circumstances of the case. Considered. Admittedly, the complaint case before the Trial Court was **filed on 19.02.2018 and the provision of Section 143A came into effect by the Act 20 of 2018 with effect from 01.09.2018.** The said amendment has been given prospective effect and thus not retrospective.

In this case the learned Magistrate by his order dated 13.03.2019, on examination of the accused under Section 251 of the Cr.P.C. wherein the accused/petitioner pleaded not guilty directed the trial to proceed in summary procedure. The Magistrate further directed that:-

“Since the accused has not pleaded guilty so in view of Section 143A of N.I. (Amendment) Act, 2018 the accused, being the drawer of cheque, is directed to pay interim compensation to the complainant of Rs. 11,00,000/- i.e. 20% of the claim amount, within 60 days from passing of this order on condition that the complainant shall be liable to pay back the amount, with interest at the bank rate as published by R.B.I. prevalent at the beginning of the relevant Financial Year to the accused in case of acquittal.

To 30.04.2013 for evidence.”

Section 143A of the Negotiable Instruments Act, 1881 lays down:-

“[143A. Power to direct interim compensation.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under Section 138 may order the drawer of the cheque to pay interim compensation to the complainant—

- (a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and*
- (b) in any other case, upon framing of charge.*

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under Section 421 of the Code of Criminal Procedure, 1973(2 of 1974).

(6) The amount of fine imposed under Section 138 or the amount of compensation awarded under Section 357 of the Code of Criminal Procedure, 1973(2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section.]”

In **G.J. Raja vs. Tejraj Surana**, the Court considered the applicability of Section 143A of N.I. Act and while doing so, discussed the following judgments of the Court:-

- (a) Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited (2015) 1 SCC1.
- (b) Hitendra Vishnu Thakur and others vs. State of Maharashtra and others 3 (1994) 4 SCC 602.
- (c) Employees' State Insurance Corporation vs. Dwarka Nath Bhargwa (1997) 7 SCC 131.
- (d) Anil Kumar Goel vs. Kishan Chand Kaura (2007) 13 SCC 492.

And on considering all other circumstances the Court held:-

*“In our view, the applicability of Section 143A of the Act must, therefore, be held to be **prospective** in nature and confined to cases where offences were committed after the introduction of Section 143A, in order to force an accused to pay such interim compensation.*

*We must, however, advert to a decision of this Court in **Surinder Singh Deswal and Ors. vs. Virender Gandhi [(2019) 8 SCALE 445]** where Section 148 of the Act which was also introduced by the same Amendment Act 20 of 2018 from 01.09.2018 was held by this Court to be retrospective in operation. As against Section 143A of the Act which applies at the trial stage that is even before the pronouncement of guilt or order of conviction, Section 148 of the Act applies at the appellate stage where the accused is already found guilty of the offence under Section 138 of the Act. It may be stated that there is no provision in Section 148 of the Act which is similar to Sub-Section (5) of Section 143A of the Act. However, as a matter of fact, no such provision akin to sub-section (5) of Section 143A was required as Sections 421 and 357 of the Code, which apply post-conviction, are adequate to take*

care of such requirements. In that sense said Section 148 depends upon the existing machinery and principles already in existence and does not create any fresh disability of the nature similar to that created by Section 143A of the Act. Therefore, the decision of this Court in Surinder Singh Deswal stands on a different footing.

In the ultimate analysis, we hold Section 143A to be prospective in operation and that the provisions of said Section 143A can be applied or invoked only in cases where the offence under Section 138 of the Act was committed after the introduction of said Section 143A in the statute book.....”

Thus it appears from the provision under Section 143A of the N.I. Act that the said Section came into force on 01.09.2018 and admittedly the petition of complaint before the Trial Court was filed on 19.02.2018 that is much prior to the coming of effect Section 143A of the N.I. Act and the said provision being given prospective effect (thus not retrospective), it is clear that the learned Magistrate wrongly applied the provision of Section 143A in the present case and as such the said order dated 13.03.2019 under Section 143A of the N.I. Act in C.R. Case no. 31 of 2018 being not in accordance with law is liable to be quashed.

Considering the aforesaid facts and circumstances of the case, the relevant provision of law, the findings/view of the Supreme Court in the judgment discussed, and the materials on record, if the orders under revision are allowed to remain then the same would be abuse of process of Court and as such the said order dated 13.03.2019 in C.R. no. 31 of 2018 pending before the Ld. Judicial Magistrate, 4th

Court, Serampore, Hooghly not being in accordance with law is hereby quashed and set aside.

Learned Magistrate to continue with the proceedings in C.R. Case No. 31 of 2018 and dispose of the same in accordance with law **within three months from the date of communication of this order.**

Accordingly, CRR 1431 of 2019 is allowed.

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 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.)