

**IN THE HIGH COURT AT CALCUTTA**

**(Criminal Revisional Jurisdiction)**

**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Shampa Dutt (Paul)**

**CRR 2673 of 2019**

**Ramananda Sengupta**

**Vs**

**The State of West Bengal & Anr.**

**For the Petitioner**

: Mr. Sujoy Sarkar,  
Mr. Mushraf Alam Sk.,  
Ms. Susmita Ghorai.

**For the State**

: Mr. Bidyut Kumar Ray,  
Ms. Rita Dutta.

Heard on

: 25.01.2023

Judgment on

: 21.02.2023

**Shampa Dutt (Paul), J.:**

The present revisional application has been preferred against the Judgment and Order dated 28.01.2019 passed by the Additional District and Sessions Judge, Fast Track, 3<sup>rd</sup> Court, Malda in Criminal Appeal No. 8/2016, affirming the judgment and order of conviction of the petitioner dated 30.11.2016 passed by Learned Chief Judicial Magistrate, Malda in Case No. 1137C/2011 under Section 138 of the Negotiable Instruments Act, 1881.

The accused petitioner's case is that the present case relates to a petition of complaint filed by the opposite party No. 2 before the Learned Chief Judicial Magistrate, Malda alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881. Upon perusal of such complaint the Learned Magistrate, was pleased to take cognizance on the same. The case was registered as Case No. 1137 C/2011.

The prosecution case is that on prayer of the accused person the complainant Bank sanctioned a house building loan in favour of the accused amounting to Rs. 2,00,000 (Rupees two lacs) and Rs. 1,00,000/- (Rupees one lac) respectively on 31.07.2001 and 08.03.2002 under certain terms and conditions of payment of the said loan amount. Accused person had to re-pay the loan in 160 equal monthly

installments. The accused violated the said terms and conditions. The complainant/bank issued notices to the accused under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. On the request of accused the complainant stopped said proceeding upon having been handed over a cheque bearing no. 15942 dated 28.03.2011 of Rs. 4,14,561/- (Rupees four lacs fourteen thousand five hundred sixty one) only covering arrear instalments and agreed to repay the subsequent instalment regularly. The complainant submitted the said cheque to Bangiya Gramin Bikash Bank, Malda Branch for collection on 26.04.2011. But the said cheque was returned by his banker with remark "fund insufficient" vide return Memo dated 26.04.2011. But again on the request of the accused person the said cheque was resubmitted on 23.08.2011. But again the said Cheque was dishonoured for the same reason and the complainant was informed accordingly on 23.08.2011 vide return Memo dated 23.08.2011 of the Bangiya Gramin Bikash Bank.

The proceedings of the present case was initiated with the recording of the plea of 'innocence' of the petitioners, under Section 251 of the petitioner in their defence.

Upon conclusion of the trial, by an order dated 30.11.2016 the Learned Chief Judicial Magistrate, Malda was pleased to find the petitioner guilty for commission of offence punishable under Section

138 of the Negotiable Instruments Act, 1881 and convicted him by sentencing him to suffer Simple Imprisonment for 2 (two) months and further directed him to pay compensation of Rs. 6,00,000/- (Six lacs) under Section 357 (3) Cr.P.C. to the complainant within 3 (three) months.

Petitioner states that on 26.09.2013 the Malda District Central Co-operative Bank Ltd. by a Memo No. HO/1294 served a notice to the petitioner under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, to take possession of the secured assets i.e. land & Building.

The Petitioner further submits that on self same cause of action two separate case/proceedings under two different Acts cannot proceed.

The Petitioner submits that he deposited Rs. 70,000/- and further made a Fixed Deposit of Rs. 15,000/- and LIC policy of a certain amount has been mortgaged with the concerned Bank.

The petitioner submits that when a case U/s 13(4)(a) of SARFAESI Act has been started, another proceeding U/s 138 of N.I. Act for the same loan amount is illegal.

Being aggrieved by and dissatisfied with the above noted judgment and order of conviction, the petitioner preferred an appeal before the Learned Sessions Judge, Malda. The said appeal was

registered as Criminal Appeal No. 8 of 2016. The learned Additional District & Sessions Judge, 3<sup>rd</sup> Fast Track Court, Malda by a Judgment and Order dated 28.01.2019 affirmed the order of conviction and dismissed the appeal.

The Petitioner states that the impugned judgment affirming the order of the petitioner's conviction under Section 138 of the Negotiable Instruments Act, 1881, is neither tenable in facts, nor in law.

The Trial Court as well as the Appellate Court made a mistake that before condoning the delay of 10 days in filing of the case under Section 138 of the N.I. Act, the Trial Court took cognizance and issued notice to the accused person which is contrary to Section 142 of the N.I. Act.

**Mr. Sujoy Sarkar learned advocate for the petitioner** has submitted that the impugned judgment of affirmation of the order of the petitioner's conviction for commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881, is neither tenable in facts nor in law.

The impugned judgment suffers from total non-application of judicial mind.

The Learned Judge failed to understand that when a case U/s 13(4)(a) of SARFAESI Act has been started another proceeding U/s 138

of N.I. Act for the same loan amount is illegal and as such the judgment and order under revision is liable to be set aside.

**In spite of due service upon the Opposite Party No. 2, there is no representation on their behalf.**

**Mr. Bidyut Kumar Ray, learned advocate appearing for the state has submitted that they also represent the Opposite Party No. 2 which is Malda District Central Co-operative Bank Limited.**

Heard both sides. Perused the materials on record. Considered.

The chief Judicial Magistrate, Malda considering all the materials on record was pleased to convict the petitioner under section 138 of the N.I. Act and sentenced him to suffer imprisonment for two months and pay compensation of Rs. 6 lakhs under Section 357 (3) of the IPC. The said judgment and order has been affirmed by the appellate Court.

The petitioner has preferred the revision on the ground that:-

- a) That both the trial court and the appellate court have **erroneously** condoned the delay of 10 days under 142 of the NI Act in filing the complaint under Section 138 N.I. Act.
- b) That on the self same cause of action two separate proceedings/case under two different acts (SARFAESI and N.I. Act) cannot proceed.

**Mr. Sarkar** has relied upon the following judgments:-

- 1) Soumen Sarkar vs State of West Bengal and Ors., CRR 863 of 2014, CRAN 5 of 2018, CRAN 7 of 2019 and CRAN 9 of 2022, on 19.05.2022, (Para 15).**

*“15. Having considered the facts and circumstances involved in this case and the argument advance by learned advocates for the parties, it appears to me that the moot question which needs to be resolved during hearing is whether the order passed by learned Magistrate, supposed to have taken cognizance of the offence is tenable under the provisions of section 138 and 142 of the Negotiable Instrument Act. It may be gathered from the impugned order dated 25.7.2013 that two cheques of Rs.1,50,000/- and as Rs.2,20,000/- were drawn by the petitioner on 2.5.2012 in favour of opposite party no.2. The cheques were presented for encashment but were dishonoured due to insufficiency of fund. On the ground of illness the complainant issued notice to the accused petitioner only on 12.11.2012 demanding payment of the cheque amounts. The complaint was lodged on 15.1.2013. This case was filed after amendment of the N.I. Act in 2002. Therefore the decisions in the case of Subodh S. Salaskar, A.K. Maheshwary and Bangur Finance Limited would not apply to the facts and circumstances of this case. In the case of Dipak Majumder Vs. Swapan Poddar (CRR 154 of 2018), learned Single Judge of this court referring to the substantive provision incorporated in proviso to clause (b) of section 142 of the Negotiable Instrument Act by way of amendment, observe that the Appellate Court failed to consider the issue of limitation while disposing of the Appeal, therefore, the judgment passed in the Criminal Appeal was set aside and the learned Judge in the court of appeal was directed to adjudicate the issue as to*

*whether the appeal is barred by limitation or not and pass a reasoned order on the basis of the submissions made by learned advocates.”*

The said judgment and the findings there in is different from the facts and circumstances in the present case.

It is seen that the Learned Magistrate in this case disposed of the petition under Section 142 N.I. Act, there by condoning the delay of 10 days in accordance with law with reasoned findings.

**2) Pawan Kumar Goel vs State of U.P. and Ors., Criminal**

**Appeal No. 1999 of 2022, on 17.11.2022, (Para 23).**

*“23. In view of the above, arguments advanced by learned counsel for the appellant that an additional accused can be impleaded subsequent to the filing of the complaint merits no consideration, once the limitation prescribed for taking cognizance of the offence under Section 142 of NI Act has expired. More particularly, in view of the fact that neither any effort was made by the petitioner at any stage of the proceedings to arraign the company as an accused nor any such circumstances or reason has been pointed out to enable the Court to exercise the power conferred by proviso to Section 142, to condone the delay for not making the complaint within the prescribed period of limitation.”*

The part of the Judgment relied upon is totally different from the facts and circumstances in the present case.

Regarding the condonation of **Delay of 10 days** in filing the complaint under Section 138 of the N.I. Act, it is seen that the **Learned Magistrate has disposed of the application under Section 142 of**

**the act with reasoned findings and in accordance with law** and as such this court finds no reason to interfere.

In respect of the opposite party proceeding against the petitioner under two acts that is SARFAESI Act and N.I. Act., the **finding again of the Learned Magistrate is in accordance with law.**

The Magistrate has rightly held that the complainant did not proceed under the SARFAESI Act on the assurance of the petitioner when he deposited some amount and issued the cheques. When the cheques were dishonoured, the present proceedings was initiated. At present only the proceedings under Section 138 of the NI Act is in force, for which the petitioner has been convicted and directed to pay compensation along with sentence of imprisonment.

The Supreme Court **in D. Purushotama Reddy & Anr. vs K. Sateesh, Civil Appeal No. 4751 of 2008, (2008) 8 SCC 505, 1 August, 2008**, held:-

*“12. Sub-section (5) of Section 357 of the Code, which is relevant for our purpose, reads as under:*

*"357. Order to pay compensation -*

*\*\*\**

*\*\*\**

*\*\*\**

*(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."*

**13.** *Evidently, a duty has been cast upon the civil courts to take into account the sum paid or recovered as compensation in terms of Section 357 of the Code. It is futile to urge that on the date on which the civil court passed the decree the appellants were not convicted. As noticed hereinbefore, the appeal is a continuation of the suit and in that view of the matter as the appellants had in total deposited a sum of Rs. 4,00,000/-, i.e., Rs. 2,10,000/- in the criminal proceeding and Rs. 1,90,000/- in the civil proceedings, out of which a sum of Rs. 3,09,000/- has been withdrawn by the respondent, the High Court was obligated to take the same into consideration. In other words, having regard to the provisions of Sub-section (5) of Section 357 of the Code, a duty was cast upon the High Court to take into account the fact that a sum of Rs. 2,00,000/- had already been paid by the appellants to the respondent. Concededly, both the proceedings were maintainable. Law recognizes the same. The Parliament must have the situation of this nature in mind while enacting Clause (b) of Sub-section (1) of Section 357 of the Code and Sub-section (5) thereof.*

**14.** *In Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Another [(2007) 6 SCC 528], while considering a question as to what should be the reasonable amount in the matter of grant of compensation vis-à-vis the power of the appellate court to issue an interim direction in relation thereto, this Court held:*

*"38. The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other. The amount of compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of the accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way, may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and*

*direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub-section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a judge.*

*39. If a fine is to be imposed under the Act, the amount of which in the opinion of Parliament would be more than sufficient to compensate the complainant; can it be said, that an unreasonable amount should be directed to be paid by the court while exercising its power under sub-section (3) of Section 357? The answer thereto must be rendered in the negative. Sub-section (5) of Section 357 also provides for some guidelines. Ordinarily, it should be lesser than the amount which can be granted by a civil court upon appreciation of the evidence brought before it for losses which might have reasonably been suffered by the plaintiff. Jurisdiction of the civil court, in this behalf, for realisation of the amount in question must also be borne in mind. A criminal case is not a substitution for a civil suit, far less execution of a decree which may be passed.*

*40. Prosecution under the Act may be contemplated as a measure of deterrence, but the same is never meant to be a persecution.*

*41. Even in a case where violation of fundamental right guaranteed under Article 21 is alleged, the amount of compensation cannot be arbitrary or unreasonable even under public law."*

*[See also Manish Jalan v. State of Karnataka JT 2008 (7) SC 643] This Court therein adopted the doctrine of purposive*

construction. It was opined that compensation directed to be paid should be a reasonable one.

**15.** In *New India Assurance Co. v. Nusli Neville Wadia and Anr.* [2007 (14) SCALE 556], it was held :

"50. Except in the first category of cases, as has been noticed by us hereinbefore, Sections 4 and 5 of the Act, in our opinion, may have to be construed differently in view of the decisions rendered by this Court. If the landlord being a State within the meaning of Article 12 of the Constitution of India is required to prove fairness and reasonableness on its part in initiating a proceeding, it is for it to show how its prayer meets the constitutional requirements of Article 14 of the Constitution of India. For proper interpretation not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein. With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/ author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfill its constitutional obligations as held by the court *inter alia* in *Ashoka Marketing Ltd (supra)*.

51. Barak in his exhaustive work on 'Purposive Construction' explains various meanings attributed to the term "purpose". It would be in the fitness of discussion to

refer to *Purposive Construction in Barak's words*:

*"Hart and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfill their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably."*

**16.** *Submission of the learned counsel for the respondent that the said question was not raised before the learned Trial Judge or before the High Court is of no moment. Sub-section (5) of Section 357 of the Code casts a duty upon the court. It was for the Trial Court/High Court to take the same into consideration. Such consideration was required to be bestowed despite the fact that the said provision was not brought to its notice.*

**17.** *Actus curiae neminem gravabit (no person shall be prejudiced by an act of court) is a well-known maxim. In any event, this Court in exercise of its jurisdiction under Article 136 as also under Article 142 of the Constitution of India can direct rectification of a mistake committed by the courts below."*

**Finally the Supreme Court in the said case** directed the Civil Court to take into consideration the amount of compensation

deposited by the appellant in the criminal case under Section 357(5) Cr.P.C.

Thus even if there are two proceedings in respect of the present case, from the same cause of action, related to the amount of the cheques and separate recovery proceedings under different acts, the courts have the power to adjust the compensation/fine **(D. Purushotama Reddy & Anr. Vs K. Sateesh (Supra))**.

So the said finding of the learned Magistrate is also in accordance with law and needs no interference by this court.

But considering the other facts and circumstances in this case and the willingness of the petitioner to make the payment of the loan amount in this case, the judgment and order dated 30.11.2016 in Case No. 1137C/2011 passed by the learned Chief Judicial Magistrate, Malda and affirmed by the Additional District and Sessions Judge, 3<sup>rd</sup> Fast Track Court, Malda, in Criminal Appeal No. 8/2016 dated 28.01.2019 **is modified** to the following extent:-

The sentence to suffer simple imprisonment for 2 months is set aside. The amount of compensation/fine is reduced to Rs. Five lakhs in default to S.I. for three months. The amount is to be paid within two months from the date of this order in default, the petitioner will undergo the sentence in default of fine/compensation.

**CRR 2673 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 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.)**