Nikita

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.25 OF 2023

Dr. Hiresh Luhar S/o Shankarlal Luhar … Applicant

V/s.

The State of Maharashtra and Ors. … Respondents

WITH

WRIT PETITION NO.663 OF 2023

Parveen Hastimal Shah S/o Late Shri Shri Hastimal Shah and Anr. … Petitioner

V/s.

State of Maharashtra and Anr. … Respondents

WITH

WRIT PETITION NO.664 OF 2023

Atul Mardia S/o Shanti Lalji … Petitioner

V/s.

State of Maharashtra … Respondent

WITH

WRIT PETITION NO.369 OF 2023

Ratanlal S/o Shri Shanti Lalji … Petitioner

V/s.

The State of Maharashtra and Anr. … Respondents

WITH

WRIT PETITION NO.4653 OF 2022

Sanjay Mardia S/o Shri Shanti Lalji … Petitioner

V/s.

The State of Maharashtra and Anr. … Respondents

Mr. J.A. Udaipuri a/w S.J Udaipuri i/b Udaipuri and Co. for the Applicant in Criminal Application No.25 of 2023.

Mr. Satyam Debey a/w Jitendra Tiwari for the Petitioner in Writ Petition No.369 of 2023.

Mr. Amit P. Ghag, for Petitioners in Criminal Writ Petition No.4653 of 2022, Criminal Writ Petition No.663 of 2023, Criminal Writ Petition No.664 of 2023.

Mr. Yashpal T. for Respondent No.2

Mr. Arfan Sait, APP for the State.

CORAM : AMIT BORKAR, J.

DATED : APRIL 3, 2023

P.C.:

1. The challenge in these petitions is the order dated 3rd November 2022 passed by Additional Sessions Judge Greater Mumbai in Miscellaneous Application No.2086 of 2022 and connected applications. Since the appeals before the learned Sessions Judge arise out of common impugned judgment passed under Section 138 of the Negotiable Instruments Act, 1881. Since the issue involved is common, all petitions are being disposed of by this common order.

Facts relevant to the adjudication of the issue involved are as under.

2. The applicants are individual directors of the accused No. 1 company. The learned Magistrate, by judgment and order dated 5th September 2022 in Criminal Case No. 4525/SS/2015, convicted and sentenced the accused company and its director jointly and severally to pay a fine of Rs.22,40,00,000/- within one month from the date of order. In addition, accused Nos.2 to 7, directors of accused No.1 company, were sentenced to suffer simple imprisonment for six months each.

3. After being aggrieved and dissatisfied, individual directors filed individual appeals before the Sessions Court. The Sessions Court, by the impugned order, suspended the sentence, subject to the condition that the accused No.1 to 7 shall jointly and severally deposit 25% of the amount of compensation within two months from the date of the order. The said order is the subject matter of challenge in these petitions.

4. Learned advocate for the applicants/petitioners relying on the order passed by this Court dated 8^{th} March 2023 in Criminal Application No.886 of 2022, **Lyka Labs Ltd. V. State of Maharashtra** submitted that the applicants being directors of accused No.1 company are liable to pay compensation as per Section 148 of the Negotiable Instruments Act, 1881. He invited my attention to the impugned order wherein the Sessions Judge referred to Section 148(3) of the Negotiable Instruments Act, 1881. Therefore, according to the learned advocate, the Sessions Judge needs to reconsider the order. He, therefore, prayed for setting aside the impugned order.

5. The learned advocate for the complainant submitted that the wrong mentioning of the provision would not take away the power of the Court if the source of such power is otherwise available to the Court. He submitted that the Apex Court, in the case of **Dilip Dahanukar Vs. Kotak Mahindra Co. Ltd. And Anr.**

reported in (2007) 6 SCC 528, recognises the power of Appellate Court to impose reasonable conditions while suspending sentence in the proceedings under Section 138 of the Negotiable Instruments Act, 1881. He, therefore, submitted that considering the scheme of the Negotiable Instruments Act, 1881 direction to pay 25% of the amount of compensation is reasonable as the accused No.1 company is also directed to pay jointly and severally 25% of the amount of compensation. He, therefore, prayed for the dismissal of the application.

6. Having carefully considered the submissions made on behalf of the parties, in my opinion, this Court, in paragraph 50 of its order dated 8th March 2023 in **Lyka labs** (supra), has held as under:

> "**50**. However, in an appeal filed by persons other than a drawer Appellate Court has power under Section 389 of Code of Criminal Procedure Act to direct deposit of amount in an appeal under section 148 of NI Act filed by persons other than "drawer" against the conviction under Section 138 of the NI Act while considering the application for suspension of conviction of sentence."

7. The Appellate Court has power under Section 389 of the Code of Criminal Procedure, 1973, to direct deposit of the amount in the exercise of power under Section 389 of the Code of Criminal Procedure, as is held in the case of **Dilip Dahanukar** (supra). Such an amount needs to be reasonable amount. In the facts of the said case, the Trial Court has directed the company to pay an amount of Rs. 25,000/-; however, the directors were directed to pay an amount of Rs.15,00,000/- and, therefore, the Apex Court brought the amount down to Rs.1,00,000/- the holding amount of Rs.15,00,000/- to be unreasonable. Therefore, in the facts of the present case, along with the appellants, the accused No. 1 company is directed jointly and severally to pay the amount of 25% of the compensation.

8. Considering the petitioner's submission, it is also necessary to consider the Amendment Act No. 55 of 2002, enacted on 6th February 2003. By the said amendment ceiling is removed. Consequently, for the offences punishable under Section 138 of the Negotiable Instruments Act, 1881, the Magistrate is conferred with the power which extends up to twice the amount of the cheque. The rationale behind the Amendment Act 55 of 2002 has been interpreted in the case of **R. Vijayan Vs. Baby and Anr.** reported in (2012) 1 SCC 260 wherein the Apex Court in paragraphs Nos.18 to 20 held as under:

> “**18.** Having reached that stage, some Magistrates go by the traditional view that the criminal proceedings are for punishing the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, mainly 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. <u>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.</u>

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 a 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.

> **20.** One other solution is a further amendment to the provisions of Chapter XVII so that in all cases where there is a conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum interest, followed by award of such sum as compensation from the fine amount. This would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of Chapter XVII of the Act, which is to increase the credibility of the instrument. This is however a matter for the Law Commission of India to consider."

9. Considering the rationale, objective and purpose of Amendment Act No.55 of 2002, the Magistrate has the power to impose twice the amount of compensation while interpreting the power of the Appellate Court of suspension sentence under Section 389 of Code of Criminal Procedure, such object and purpose of Amendment Act No.55 of 2002 and Negotiable Instruments Act, 1881 needs to be taken into consideration. In my opinion, therefore, in the facts of the case, a deposit of 25% of the amount of compensation is reasonable.

10. In so far as the contention raised on behalf of the petitioner, that the impugned order has been purportedly passed under Section 148(3) of the Negotiable Instruments Act, 1881, it is not in dispute that the Appellate Court is invested with the power of suspension of sentence under Section 389 of Code of Criminal Procedure. It is well settled that merely mentioning the wrong provision in the impugned order would not vitiate the exercise of power by the Court or quasi-judicial authority if such authority or Court has otherwise control to pass such order. Considering the object and purpose of the Negotiable Instruments Act 1881 and

Amendment Act No.55 of 2002, in my opinion, once the accused are convicted, the presumption of innocence is no longer available. The amount of 25% of the compensation, therefore, in my opinion, is reasonable in the facts of the case.

11. The learned advocate for the applicant submitted that an order under Section 434 of the Companies Act 2013 had been passed against the accused No.1 company. The learned advocate for the complainant offers that this fact was never brought to the notice of either the Magistrate or the Appellate Court before passing the impugned order. In the absence of such question of fact being made subject matter of adjudication, this Court can not consider the effect of such order if such order has been passed.

12. Therefore, in the absence of perversity or miscarriage of justice, it is not necessary to interfere with the order. All the petitions are, therefore, dismissed. No costs. In that view of the matter, interim relief granted by this Court stands vacated.

13. The applicants/petitioners are permitted to deposit the amount as per the impugned order within 4 weeks from today.

(AMIT BORKAR, J.)