

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.622 OF 2023

Shree Radhey Trading Co. & Anr.

...Applicants

Versus

The State of Maharashtra & Anr.

...Respondents

Mr. Subhash Jha a/w Ms. Alka Pandey for the Applicants.

Mr. A.R. Patil, APP for the State-Respondent No.1.

Mr. Yashpal Thakur i/w Ms. Jalpa Shah, Mr. Vinit Vaidya i/by MZM
Legal for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 27th JUNE, 2023.

PC. :

1. The Applicants in this Application have challenged the order passed by the learned Additional Sessions Judge, Court Room No.54, Greater Bombay on 8th May, 2023 in Criminal Appeal No.701 of 2022 arising from CC No.8452/SS/2015 pending before the learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai.

2. Heard Shri. Subhash Jha, learned counsel for the Applicant, Shri. A.R. Patil, learned APP for the State-Respondent No.1 and Shri. Yashpal Thakur, learned counsel for the Respondent No.2.

3. The Applicants were the original Accused in the proceedings before the learned Magistrate. The complainant i.e. the Respondent No.2 herein had initiated the said prosecution under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act'). The case of the complainant was that, the complainant was carrying on business as a Spot Exchange providing for an electronic platform for spot contracts in commodities on a compulsory delivery basis since 2008. The Accused committed certain defaults in pay-ins on the exchange by the Accused and a huge amount was due and payable by them. Towards part payment and in discharge of partial liability, the Accused issued cheque No.877895 dated 21st December 2011 of Rs.31,06,90,279/- drawn on Punjab National Bank, Spl. SSI Branch, Sharanpur (UP). This cheque, on presentation, was dishonoured. After complying with the statutory requirements, the prosecution was launched. At the end of the trial, the Accused No.2 was convicted for the offence punishable under Section 138 of the N.I. Act and was sentenced to pay a fine of Rs. 62,13,80,55/- within one month from the date of order; and in default, Accused No.2 i.e. Applicant Ramesh Nagpal herein was sentenced to suffer further simple imprisonment for six months. The fine amount, if recovered, was directed to be paid to the complainant as compensation under

Section 357(3) of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.').

4. The Applicants then preferred the Appeal being Criminal Appeal No.701 of 2022 before the Court of Sessions at Greater Bombay. In that Appeal, Miscellaneous Application No.2550 of 2022 was preferred for suspension of sentence. On 4th January, 2023, the learned Additional Sessions Judge suspended the sentence till disposal of the Appeal on the condition of depositing minimum 20% of the amount of the total compensation, which was directed to be paid within 60 days from the date of order dated 4th January, 2023.

5. After this order was passed, an application below Exhibit-4 in the same Miscellaneous Application was made for extension of time. Vide order dated 30th March, 2023, the time to deposit that amount was extended till 4th April, 2023. After that, another Application was preferred for further extension of three months. At the same time, the original complainant i.e. Respondent No.2 herein preferred his own Application for vacating the order of suspension of sentence. Both these Applications were decided by a common order dated 8th May, 2023 passed by the learned Additional Sessions Judge, Court Room No.54, Greater Bombay. The Applicants' Application for extension of time was rejected and the complainant's Application for vacating the

order dated 04th January, 2023 for suspension of sentence was allowed.

6. After this order was passed, the present Application is filed before this Court challenging the order. During pendency of this Application, the Applicant No.1 is taken into custody on 20th June, 2023. In these circumstances, I have heard learned counsel for the parties.

7. Learned counsel for the Applicants submitted that Section 357(2) of Cr.P.C. lays down that payment of such amount cannot be directed to be made till the period of presenting the appeal had elapsed, or, if an appeal is presented, then before the decision of the appeal. He relied on the judgment of the Hon'ble Supreme Court in the case of *Dilip S. Dahanukar Versus Kotak Mahindra Co. Ltd. and Another* as reported in *(2007) 6 Supreme Court Cases 528* in support of his submission. He submitted that by imposing such condition, the Applicants' statutory valuable right of preferring the appeal is taken away from them, which is clear violation of Article 21 of the Constitution of India. He submitted that, on merits, he has a good case as the complainant does not have any legal right to force the Applicants to make the payment of the cheque amount because there was no legally enforceable liability. Many cases are, in fact, pending

against the complainant. He submitted that the Applicants' entire property, including the bank accounts and immovable property, is seized during investigation and the Applicants were not in a position to make any payment; and thus, their valuable right in preferring the appeal is frustrated. He further submitted that the complainant has an option to proceed in accordance with Sections 421 and 431 of Cr.PC.

8. Learned counsel for the Applicants relied on the order of the Punjab and Haryana High Court in the case of ***Vivek Sahni Versus Kotak Mahindra Bank Ltd.*** as reported in ***AIRONLINE 2019 P&H 2027***.

9. Learned counsel also relied on an order of the Hon'ble Supreme Court in the case of ***R Kalai Selvi Versus Bheemappa*** passed in ***Criminal Appeal No(s). 747 of 2021*** decided on 4th August 2021, as well as on the order of the High Court of Punjab and Haryana in the case of ***Amit Kumar (Deceased) through his LR's Mother Smt. Sushila Devi versus State of Haryana and Another*** passed in CRM No. 20603 of 2022 decided on 6th July 2022. Learned Counsel, therefore, submitted that the impugned order of vacating the suspension of sentence be set aside; and since the Applicant No.2 is already taken into custody, he be released on bail.

10. Learned counsel appearing for the complainant supported the impugned order. He heavily relied on the observations of the Bhalchandra

Hon'ble Supreme Court in the case of *Surinder Singh Deswal Alias Colonel S.S. Deswal And Others Versus Virender Gandhi And Another* as reported in *(2020) 2 Supreme Court Cases 514*. He submitted that the learned Additional Sessions Judge has rightly relied on this judgment in passing the impugned order. He further submitted that the said provision of Section 148 of the N.I. Act will have to be followed in letter and spirit. It cannot be accepted as an excuse that the entire property of the accused is attached. He submitted that the prosecution was pending since the year 2013 and for 10 years the accused had ample opportunities to make the payment of the cheque amount; and therefore, after 10 years, they cannot make this excuse that their property was attached during the investigation.

11. I have considered these submissions. In this context, following provisions are necessary to be reproduced, as follows :

Section 148 of the N.I. Act.

“148. Power of Appellate Court to order payment pending appeal against conviction.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial Court:

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub-section (1) shall be deposited 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 appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, 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.”

Section 357 of Cr.PC.

“357. Order to pay compensation.—(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying the expenses of properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of

the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(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.”

12. Learned counsel for the Applicant has heavily relied on Dilip S. Dahanukar’s case (Supra). In that case, the Hon’ble Supreme Court discussed the provisions of Section 357 and 421 read with Section 431 of Cr.P.C. In paragraph No.11 of the said judgment, it was observed that, a statute must be read harmoniously. An amount of compensation directed to be paid may not form part of a fine. It may be awarded separately. It may be recoverable as if it is a fine in terms of Section 431 of the Code but by reason thereof it would not become automatically recoverable forthwith. The legal position, however, must be considered keeping in view the purport and object of the Act. In paragraph 32, there was observation as to how under Section 357 (2) of Cr.P.C. realization of fine in respect of factor(s) enumerated in Clause (1) of Sub-section (1) of Section 357 is to be stayed automatically. In paragraph No.35, it was observed that for the purpose of payment of compensation, it was necessary to look into the capacity of the accused to pay the amount and the purpose for which it was directed to be paid. In paragraph No.41, it was observed that 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. In paragraph No.46, it was reiterated that the amount of compensation cannot be recovered forthwith, unless the period of appeal has expired as provided under Section 357(2) of Cr.P.C. Learned counsel for the Applicants heavily relied on these observations.

13. In the case of Vivek Sahni (*supra*), a Single Judge Bench of the Punjab and Haryana High Court observed that default in payment of certain percentage of compensation or fine, would not *ipso-facto* result in cancellation of bail. The Hon'ble Supreme Court in R Kalai Selvi's case (*supra*) had observed that there was no such mandatory statutory requirement of pre-deposit for the purpose of maintaining the Revision Petition before the High Court.

14. On the other hand, as rightly submitted by the learned counsel for the original complainant, Section 148 of the N.I. Act was brought into force in the year 2018 with a specific object. The said Section starts with the non-obstante clause, as the said Section applies notwithstanding anything contained in the Code of Criminal Procedure. This Section was exhaustively analyzed by the Hon'ble Supreme Court in Surinder Singh Deswal's case (*supra*). There was a reference made to the earlier case between the same parties. The said

judgment was reported in (2019) 11 SCC 341 (Surinder Singh Deswal Versus Virender Gandhi). While referring to the earlier judgment between the same parties, the Hon'ble Supreme Court reproduced some part of the earlier judgment reported in (2019) 11 SCC 341. In that judgment, it was noted that considering the object and purpose of the amendment in Section 148 of the N.I. Act, while suspending the sentence in exercise of powers under Section 389 of the Code of Criminal Procedure, when the first Appellate Court directed the appellants to deposit 25% of the amount of fine/compensation as imposed by the trial Court; the order can be said to be absolutely in consonance with the Statement of Objects and Reasons of amendment in Section 148 of the N.I. Act. It was further observed that, because of the delay tactics of unscrupulous drawers of dishonored cheques due to easy filings of appeals and obtaining stay on proceedings, the object and purpose of the enactment of Section 138 of the N.I. Act was being frustrated. Therefore, the Parliament has thought it fit to amend Section 148 of the N.I. Act, by which the First Appellate Court, in an Appeal challenging the order of conviction under Section 138 of the N.I. Act, is conferred with the power to direct the convicted appellant-accused to deposit such amount which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. By the amendment in Section 148 of the N.I. Act, it cannot be said that any

Bhalchandra

vested right of appeal of the appellant-accused has been taken away or is affected. In paragraph No.20 of the judgment of Surinder Singh Deswal (2020) 2 Supreme Court Cases 514, it was further observed that it was for the Appellate Court, who had granted suspension of sentence to take a call on non-compliance and take appropriate decision. What order is to be passed by the Appellate Court in such circumstances is for the Appellate Court to consider and decide. However, non-compliance of the condition of suspension of sentence is sufficient to declare suspension of sentence as having been vacated. These observations clearly answer the issues raised by learned counsel for the Applicants in his submissions. Surinder Singh Deswal's case is directly on the point involved in the present Application.

15. In the impugned order, the learned Judge has rightly relied on Surinder Singh Deswal's case to arrive at his conclusion. He has further observed that Section 148(2) provides for maximum period of 90 days for depositing the said amount, which was also over. As far as the seizure of Applicants' property is concerned, as rightly submitted by the learned counsel for the Respondent No.2, the prosecution was pending since year 2013 and therefore, the Applicants had sufficient time to arrange for the amount of the dishonored cheque. Learned counsel for the Respondent No.2 is also right in his submissions that

the seizure of property of the Applicants cannot be used as an excuse to defeat the object for which Section 148 of the N.I. Act was brought into force. The question of legally enforceable liability is pending before the Sessions Court in the Appeal. In this Application exercise of power of the Appellate Court under Section 148 of the N.I. Act is the issue. The Additional Sessions Judge has committed no error in passing the impugned order.

16. Considering this discussion, I do not find any reason to interfere with the impugned order. Consequently, the Application is rejected. However, since the Applicant No.2 is in custody, the learned Additional Sessions Judge is requested to decide the Appeal on a priority basis. Both the parties are directed to co-operate with the earliest disposal of the Appeal, pending before the learned Additional Sessions Judge.

17. With these observations, the Application is disposed of.

(SARANG V. KOTWAL, J.)