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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 11.01.2023
Pronounced on: 01.05.2023

+ CRL.M.C. 172/2023 & CRL.M.A. 723/2023 & CRL.M.A.
724/2023

GULSHAN ARORA & ANR. Petitioner

Through: Mr. Prem Kandpal, Mr. Nakul
Singal, Ms. Yogita Bansal and
Mr. Himanshu, Advocates

versus

STATE OF NCT OF DELHI & ANR. Respondents

Through: Mr. Satish Kumar, APP for
State.
Mr. Kunal Anand, Mr.
Sandesh Kumar, Mr. Jai Batra
and Mr. Amresh Bind,
Advocates for complainant.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. By way of present petition filed under Section 482 of the Code of Criminal Procedure, 1973 (*hereinafter* 'Cr.P.C.'), the petitioners seek quashing/setting aside of the order dated 01.10.2022 passed by learned Special Judge-NDPS/ASJ, South, Saket Courts, and order dated 06.01.2023 passed by learned ASJ-07, South, Saket Courts, (*hereinafter* 'Appellate Court') in CA No. 134/2021 titled as "Gulshan Arora & Anr. vs. State (GNCT of Delhi) & Anr."

2. The aforesaid impugned orders of the learned Appellate Court emanate from the Appeal filed by the petitioners herein against their conviction under Section 138 of Negotiable Instruments Act, 1881 (*hereinafter 'NI Act'*) in CT Case No.11160/2017 titled as "Arun Malhotra v. Gulshan Arora &Anr."

2.1. The petitioners, *vide* judgment dated 22.10.2021, were held guilty under Section 138 of NI Act by the Court of learned MM (NI Act-03)/South, Saket Courts, New Delhi (*hereinafter 'Trial Court'*) and the concluding portion of said judgment reads as under:

"...Conclusion:

25. In view of the foregoing discussion, this court holds that complainant has established his case beyond reasonable doubt by proving all the ingredients under Section 138 NI Act and the accused persons have failed to raise a probable defence.

26. Accused Gulshan Arora and Gaurav Arora are hereby convicted for offence punishable under Section 138 NI Act qua the cheque in question in the present case..."

2.2. The learned Trial Court *vide* order dated 18.11.2021, sentenced the petitioners to payment of fine of Rs.27,20,000/-, to be paid within 45 days to the complainant, and in default of such payment of fine, to undergo a simple imprisonment for a period of six months. The relevant portion of this order reads as under:

"8. In the totality of the aforesaid facts and circumstances, the amount involved in the cheque in question, and keeping in view that the complainant has been running from pillar to post to recover the amount due to her on the one hand and the circumstances of the accused on the other hand, this

court is of the opinion that the scales of justice would be balanced if the convicts are sentenced to pay fine of Rs.27,20,000/- (Rupees twenty-seven lakhs and twenty thousand only), the whole of which is to be paid to the complainant as compensation jointly and severally within 45 days. In default of payment of said fine, convicts shall undergo simple imprisonment for a period of six months...”

3. Upon an appeal being filed by the petitioners against aforesaid orders, their sentence was suspended by the learned Appellate Court *vide* order dated 17.12.2021.

4. Thereafter, while deciding an application filed by original complainant/respondent no. 2 under Section 148 of NI Act, petitioners were directed by learned Appellate Court to deposit 20% of the amount of fine imposed upon them by the learned Trial Court. The relevant extracts of this order dated 01.10.2022 are as under:

“...The impugned judgment reveals that during trial, the issuance of the cheque in dispute, the signatures of the appellants on the cheque, the dishonour of the cheque were all admitted. These facts make it a good case for granting relief u/s 148 NI Act. It is clarified that these observations shall have no bearing on the disposal on the appeal on its merits.

Accordingly, the application u/s 148 NI Act is allowed. The appellant is directed to deposit 20% of the fine amount as awarded by the Ld. Trial Court. The amount be deposited within 60 days from today in the form of an FDR. The said FDR should be in the name of the respondent and shall be released to the respondent as and when requested. The respondent undertakes to repay this amount/FDR so received by him, subject to the disposal of this appeal.

To come up for arguments on this appeal on 06.01.2023...”

5. Thereafter, on 06.01.2023, learned Appellate Court vacated the order of suspension of sentence dated 17.12.2021 due to non-payment of 20% of the amount of fine within stipulated time period, and directed the petitioners to surrender within 7 days from passing of the said order. The relevant portion of this order is as under:

“...As per Section 148 of NI ACT, the aforesaid minimum amount of Rs. 20% is to be deposited within 60 days from the date of order on sufficient cause being shown, a further period of 30 days may be granted. Hence, it can be seen that the court may grant a maximum period of 90 days for compliance of the said order, which in the present case have clearly lapsed. Even no explanation has been given by counsel for the appellants as to why she did not exercise the right of revision earlier or why no steps have been taken to remove the defects in filing the revision. No relief can be granted on such casual attitude. Granting further time will defeat the very objective with which section 148 NI ACT was inserted in NI ACT 1881 and in the opinion of this court, non compliance of the said order is sufficient to declare order of suspension of sentence vacated. Accordingly, the stay on order of sentence imposed by my Ld. Predecessor vide order dt. 17.12.2021 is vacated. Both the appellants are directed to surrender before the concerned Trial Court/Successor Court within a period of 7 days to serve the sentence awarded by the Ld. Trial Court vide order of sentence dt. 18.11.2021...”

6. Aggrieved by the orders of learned Appellate Court, the petitioners have approached this Court seeking setting aside of the aforesaid impugned orders.

7. The case of the petitioners before this Court is that they had been falsely implicated in the case under Section 138 of NI Act which is evident from the fact that on the same day when petitioners were convicted in CT Case No.11160/2017, they were acquitted *vide* another

judgment dated 22.10.2021 of the same Court in CT Case No. 27782/2019 arising out of the same set of facts between the same parties in respect to same transaction. It is stated that the learned Trial Court while acquitting the petitioners in the second judgment noted that the respondent no. 2 was stating two different sets of facts with respect to the same transaction in the two cases. Thus, it is argued that the learned Trial Court committed grave error by convicting the petitioners in CT Case No.11160/2017, and the petitioners have a strong case in the Appeal filed by them which is pending before the learned Appellate Court.

8. Learned counsel for petitioners submits that the impugned order dated 01.10.2022 was passed in the absence of the counsel for petitioners, and even though a request for adjournment was made by the petitioners, the same was declined by the learned Appellate Court and it proceeded to direct the petitioners to deposit 20% of the amount of fine imposed by the learned Trial Court. It is stated that this amount, which would be around Rs.5,44,000/-, was directed to be deposited within 60 days, without hearing the arguments of counsel for petitioners who would have argued for an exception to be carved out in the present case from depositing the said amount of fine. It is stated that due to peculiar circumstances of the case, as mentioned in preceding para, the petitioners must be exempted from depositing the amount of fine. It is further argued by learned counsel for petitioners that impugned order dated 06.01.2023, vacating the order of suspension of sentence of petitioners is absolutely illegal and perverse in law.

9. On the other hand, learned APP for State as well as learned

counsel for respondent no. 2 argues that the impugned orders do not suffer from any illegality or infirmity. It is stated that learned Appellate Court had rightly understood and applied the provisions of Section 148 while ordering the petitioners to deposit 20% of the fine imposed by learned Trial Court. It is further argued that as rightly held by Appellate Court, non-payment of such fine would dis-entitle the petitioners to enjoy the suspension of sentence during the entire period of pendency of their Appeal. It is also argued that the judgment dated 22.10.2021 *vide* which the petitioners were convicted under Section 138 NI Act also does not suffer from any illegality and, thus, no special circumstances exist in order to exempt the petitioners from depositing the amount as per Section 148 NI Act.

10. This Court has heard arguments on behalf of both sides and has perused the material placed on record.

11. The relief, in a nutshell, prayed before this Court is, *firstly* waiving off the payment of 20% of amount of fine imposed upon the petitioners as per section 148 NI Act and *secondly*, setting aside the order whereby suspension of sentence was ordered to be vacated due to non-payment of said amount.

12. Since the issue for consideration before this Court primarily relates to Section 148 of NI Act, 1881, it would be appropriate to first refer to the same. The said provision is reproduced as under:

“148. Power of Appellate Court to order payment pending appeal against conviction - (1) Notwithstanding anything contained in the Criminal Procedure Code, 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 per cent. 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.”

13. The aim, object and purport of Section 148 was explained by the Hon’ble Apex Court in *Surinder Singh Deswal @ Col S.S. Deswal v. Virender Gandhi* (2019) 11 SCC 341, (hereinafter ‘*Surinder Singh Deswal-I*’) wherein it was categorically held that the use of words “may” in Section 148 must be construed as “shall” in order to give force to the actual intent behind insertion of such provision under the NI Act, 1881. The relevant observations of the Apex Court are extracted herein-below:

“7.1. Having observed and found that because of the delay tactics of unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings,

the object and purpose of the enactment of Section 138 of the NI Act was being frustrated, Parliament has thought it fit to amend Section 148 of the NI Act, by which the first appellate court, in an appeal challenging the order of conviction under Section 138 of the NI Act, is conferred with the power to direct the convicted appellant-accused to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court.....

8. Now so far as the submission on behalf of the appellants that even considering the language used in Section 148 of the NI Act as amended, the appellate court "may" order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court and the word used is not "shall" and therefore the discretion is vested with the first appellate court to direct the appellant-accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the appellants would be contrary to the provisions of Section 148 of the NI Act as amended is concerned, considering the amended Section 148 of the NI Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the NI Act, **though it is true that in the amended Section 148 of the NI Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the NI Act confers power upon the appellate court to pass an order pending appeal to direct the appellant-accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the appellant-accused under Section 389 CrPC to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the NI Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may**

be directed by the appellate court for sufficient cause shown by the appellant. Therefore, if amended Section 148 of the NI Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the NI Act, but also Section 138 of the NI Act. The Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonour of cheques. **So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions,** Parliament has thought it fit to amend Section 148 of the NI Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the NI Act and also Section 138 of the NI Act.”

(Emphasis supplied)

14. A perusal of the aforesaid decision of Hon’ble Apex Court also reveals that though the Appellate Court is required to ordinarily direct an accused/appellant to deposit a minimum of 20% of fine/compensation imposed upon him, either on its own while ordering suspension of sentence under Section 389 Cr.P.C. or upon an application moved by the complainant under Section 148 NI Act, the Appellate Court, however, may choose to not impose such a condition upon an accused/appellant for “special reasons” to be assigned or recorded.

15. The petitioners herein seek a waiver of the condition imposed upon them to deposit 20% of the fine during the pendency of their

appeal against conviction. As stated in preceding para, this prayer can only be allowed in case the Court arrives at a conclusion that there are special circumstances and reasons to do so.

15.1. The primary ground of the petitioners for seeking such a waiver, is that on the same day when the judgment convicting the petitioners under Section 138 was passed in CT Case No. 11160/2017, the petitioners, *vide* another judgment in CT Case No. 27782/2019, were acquitted of the same offence by the learned Trial Court. It is stated that both these cases had arisen out of same set of facts and transactions and between the same parties, and even the learned Trial Court while acquitting the petitioners in another case had taken note of the contradictions and lacunae in the case of the respondent no. 2 who was stating two different set of facts with respect to the same transaction in two cases.

15.2. By way of reply to the application under Section 148 of NI Act, the petitioners had also raised the aforesaid contentions before the Appellate Court, and the Appellate Court after going through the same and after perusing the judgment of conviction had directed the petitioners to deposit 20% of the fine within 60 days.

15.3. A perusal of the judgment of conviction dated 22.10.2021 reveals that the cheques in dispute, their issuance and the signatures upon them were admitted by the petitioners before the learned Trial Court. Their defence, that blank cheques were issued in respect of a Committee of Rs. 6 lacs, and not in respect of alleged transaction of Rs. 40 lacs, was not accepted by the Trial Court in absence of any evidence in that regard. It was also noted that even the complainant was not able

to produce any documents as such to prove the details qua the alleged transactions. However, since the issuance of cheque and signatures were admitted and because the presumptions under NI Act remained unrebutted by the petitioners, they were convicted accordingly. Whereas, in another case i.e. CT Case No. 27782/2019, the petitioners were acquitted mainly on the ground that there were contradictions in the statements of complainant as to in which form he had paid the alleged amount of Rs. 40 lacs to the petitioners. While in present case, he had stated the same to have been paid by way of cash, but in the other case, the amount was stated to have been paid in parts, wherein Rs. 38 lacs were paid through cheque and only Rs. 2 lacs were paid in cash. Therefore, the petitioners were acquitted in the second case after the learned Trial Court had taken note of such deviation and contradictions in the statements of complainant.

15.4. As observed, the only ground on which waiver under Section 148 of NI Act is sought is that the petitioners have a good case of acquittal in the appeal in view of the above-stated facts. This ground alone, in the opinion of this Court, is not sufficient to exempt the petitioners from depositing 20% of the fine amount imposed by the learned Trial Court, as per Section 148 of NI Act. The fact remains that the parties were heard and their evidence was recorded and appreciated by the same Court in both the Complaint cases arising out of same set of facts, and the judgments were also passed on the same day. The merits of the appeal filed by the petitioners and their contentions cannot be considered while exercising powers under Section 148 of NI Act.

15.5. Needless to say, every accused convicted under Section 138,

who files an appeal against conviction, believes to have a good case for acquittal. This, by no stretch of imagination, can be held to fall within the purview of “special reasons” to allow a convict under Section 138 to not deposit a portion of the fine imposed upon him during the pendency of appeal. Allowing such a prayer would be against the purpose, intent and mandate of Section 148, which was well-explained by the Apex Court in *Surinder Singh Deswal-I* (*supra*), as mentioned in para 13 of this judgment.

16. Another relief sought before this Court relates to quashing of order dated 06.01.2023 passed by the learned Appellate Court whereby the suspension of sentence of the petitioners was vacated upon their failure to deposit the 20% of fine amount and they were asked to surrender within 7 days.

17. The legal position with respect to imposition of condition to deposit a percentage of fine/compensation amount while granting suspension of sentence in a case under Section 138 of NI Act, was explained by the Hon’ble Apex Court in case of *Surinder Singh Deswal v. Virender Gandhi* (2020) 2 SCC 514 (*hereinafter* ‘*Surinder Singh Deswal-II*’) as under:

“19. The High Court is right in its opinion that question No.2 as framed in Vivek Sahni’s case was not correctly considered. When suspension of sentence by the trial court is granted on a condition, non-compliance of the condition has adverse effect on the continuance of suspension of sentence. **The Court which has suspended the sentence on a condition, after noticing non-compliance of the condition can very well hold that the suspension of sentence stands vacated due to non-compliance. The order of the Additional Sessions Judge declaring that**

due to non-compliance of condition of deposit of 25% of the amount of compensation, suspension of sentence stands vacated is well within the jurisdiction of the Sessions Court and no error has been committed by the Additional Sessions Judge in passing the order dated 20.07.2019.

20. It is for the **Appellate Court who has granted suspension of sentence to take 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.”

(Emphasis supplied)

18. As held by Hon’ble Apex Court in *Surinder Singh Deswal-I (supra)* the intent behind amendment of Section 148 NI Act was to address the unfairness caused to the payee of a dishonoured cheque since the unscrupulous drawers of the dishonoured cheques were able to employ delay tactics by filing appeals and obtaining stay on proceedings. In this regard, a reference can also be made to the Statement of Object and Reasons of the Negotiable Instruments (Amendment) Act, 2018, which *inter alia* provides as under:

“ STATEMENT OF OBJECTS AND REASONS

1. The Negotiable Instruments Act, 1881 (the Act) was enacted to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques. The said Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of dishonour of cheques. However, the Central Government has been receiving several representations from the public including trading community relating to pendency of cheque dishonour cases. This is because of delay tactics of

unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in court proceedings to realise the value of the cheque. Such delays compromise the sanctity of cheque transactions.

2. It is proposed to amend the said Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy...”

19. Thus, it can be held that the aim of this provision was to provide a certain degree of relief to the complainant who would have suffered due to dishonor of the cheque. Since an appellant is convicted under Section 138 after going through a detailed procedure and appreciation of evidence, in such circumstances, Section 148 NI Act makes way for some relief to the complainant by empowering the Appellate Court to direct payment of some portion of the fine/compensation, in favour of the complainant during the pendency of appeal.

20. In the present case, the petitioners were sentenced to payment of fine of Rs. 27,20,000/-, to be paid to the complainant as compensation, within 45 days and in default of payment of fine, to undergo simple imprisonment for a period of six months. The sentence of petitioners was suspended *vide* order dated 17.12.2021, however, no condition was imposed by the Appellate Court upon the petitioners to pay or deposit

any amount of the fine imposed upon them. Thereafter, while allowing the application of complainant/respondent no. 2 under Section 148 of NI Act, the Trial Court ordered the petitioners to deposit 20% of the fine amount, within 60 days, in the form of an FDR.

21. Merely because the condition to deposit 20% of the fine amount was not imposed upon the petitioners at the time of suspension of sentence by the learned Appellate Court, it cannot be held that the vacation of order of suspension of sentence upon non-fulfilment of such a condition imposed subsequently by the learned Appellate Court was bad in law. As observed by Hon'ble Apex Court in ***Surinder Singh Deswal-II (supra)***, the Appellate Court who has granted suspension of sentence has ample powers to take call on non-compliance and what order is to be passed in such circumstances is for the Appellate Court to consider and decide.

22. It will be travesty of justice if the petitioners are allowed to continue with their appeal against conviction under Section 138 of NI Act without depositing or paying to the respondent the 20% of the amount of fine on the ground that suspension of sentence cannot be revoked, as holding so would defeat the inherent aim and object of Section 148 of NI Act and would render the respondent remediless.

23. Considering the mandate of Section 148 NI Act as explained by Apex Court in ***Surinder Singh Deswal-I (supra)*** and the powers of Appellate Court in revoking the suspension of sentence apropos Section 148 NI Act as explained by the Apex Court in ***Surinder Singh Deswal-II (supra)***, this Court finds no infirmity in the impugned order dated 06.01.2023 whereby the petitioners have been directed to

surrender, upon non-fulfilment of condition under Section 148 NI Act.

24. Thus, in view of the overall facts and circumstances of the case, the petitioners are directed to deposit 20% of the amount of fine imposed by the learned Trial Court, within 10 days from today, in default of which the petitioners shall surrender before the Trial Court concerned within one week of last day on non-payment of aforesaid amount.

25. Accordingly, the present petition stands disposed of along with pending applications in above terms.

26. However, it is made clear that the observations made by this Court are for the purpose of deciding the present petition only and the same shall have no bearing on the pending appeal of the petitioners.

27. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 1, 2023/ns

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