01.05.2024
Serial no.13
Aloke
Ct. No. 30

CRR 1253 of 2019
with
CRAN 1 of 2019 (Old No. CRAN 1799 of 2019)
CRAN 2 of 2019 (Old No. CRAN 1800 of 2019)

Soumitra Maity
Vs.
Niranjan Kumar Bhunia alias N.K. Bhunia & Anr.

Mr. Sumanta Ganguly
... for the petitioner
Mr. Gobinda Banerjee
Mr. Subrata Mukherjee
... for the opposite party no. 1

1. The present revisional application has been preferred against a Judgment and Order No. 22 dated 18.03.2017 passed by the Learned Additional District & Sessions Judge, (F.T.C No. II) at Calcutta, in Criminal Revision No. 01 of 2015, thereby confirming the judgment and order of conviction and sentence order dated 27.10.2014 passed by the Learned 19^{th} Metropolitan Magistrate, in C/16014/2011 under Section 138 of Negotiable Instrument Act 1881, in which the revisionist has been convicted and sentenced to suffer S.I. 01 (One) month and also to pay compensation of Rs 4,00000/- (Rupees Four Lakhs Only) to the complainant u/s 357 (3) Cr.P.C. within three months from the date, I.D. to suffer further S.I. for six months.

2. The brief fact that gave rise to the present revisional application is that, on 20.06.2011 respondent no. 1 being complainant filed a complaint case being no. C/16014/2011 against the present petitioner, alleging that he provided financial assistance to the tune of

Rs.250000/- to the petitioner/accused person to overcome his financial stringency. Subsequently, in discharge of his liability, the petitioner issued two cheques in favour of the respondent no. 1 for a sum of Rs.100000/- each. However, on presentation for encashment within the validly period, those cheques were dishonoured on 09.05.2011 with remark "Account Closed". Thereafter, respondent no. 1 issued demand notice upon the petitioner on 18.05.2011 asking him to pay the amount of dishonoured cheques. The petitioner received the notice on 23.05.2011 but did not pay the amount. The case was subsequently transferred before the Court of learned 19th Metropolitan Magistrate, Calcutta for trial and after conclusion of trial learned 19th Metropolitan Magistrate, Calcutta held the petitioner guilty for the offence punishable under Section 138 of N.I. Act and sentenced him to suffer S.I. for one month and also to pay compensation of Rs.4,00000/- (Rupees four lakhs only) to the complainant under Section 357(3) Cr.P.C. within three months from the date, in default to suffer further S.I. for six months.

3. The defence case is that the petitioner/accused person worked for the respondent no. 1/complainant for decorating his house but the complainant did not pay any amount and as such petitioner asked the complainant to give Rs.200000/- as the petitioner was in urgent need of money and the complainant told the petitioner to issue cheque in his favour. As the complainant agreed to give remuneration to the accused in his account but he did not transfer any money to his account, as such the two cheques were dishonoured.

4. That during trial the complainant adduced only one witness i.e. the representative of the company viz. Mr. Sushil Kr. Lunia by way of affidavit-in-chief as well as tendered documents including cheques, bank memo, debit advice memo, demand notice, postal receipt, envelop, A/D card and petition of complaint.

5. The learned Magistrate on completion of trial by a judgment dated 27.10.2014 convicted the appellant herein to suffer S.I. for one month and pay compensation of Rs.400000/- to the complainant within three months from the date of this judgment, I.D. to suffer further S.I. for six months. The appellant has consistently not appeared before this Court and accordingly a legal aid counsel has been appointed by this Court.

6. On hearing the learned legal aid counsel for the appellant and the judgment under appeal and the written notes filed by the complainant/opposite party herein, this Court finds that the cheque in question was issued by the appellant herein in discharge of his existing legal liability which he could not successfully rebut.

7. **The opposite party/complainant has relied upon the following judgments:-**

i) Karnataka High Court, Shivaji vs Gurudeva, 2004(1), Criminal Petition No. 3673 of 2021 decided on 11-11-2003.

ii) Andhra Pradesh High Court, Smt. V. Balaraju vs M/S Prakash 2005(1) Bankmann 194 Criminal Petition No. 3834 of 2004 decided on 01-10-2004.

iii) Delhi High Court, Shankar Lal Agarwal vs Balaram Luthra 2008(2) Bankmann 268 (Del) Criminal Appeal No. 779 of 2003 decided on 14-12-2007.

iv) Madras High Court, Devendra Pundir vs Rajendra Prasad Maurya 2009(1) Bankmann 114 (Mad) Criminal OP No. 1582 of 2006 Decided on 24-04-2007.

v) Shankar Lal Aggarwal vs Balram Luthra [2008(2) Bankmann 268 (Del)].

vi) Devendra Pundir vs Rajendra Prasad Maurya [2009(1) Bankmann 114 (Mad)].

vii) Raghu Lakshminarayanan vs Fine Tubes, [2007 All MR (Cri) 1738 (SC); (2007) 5 SCC 103].

viii) Dr. V. Bala Raju vs M/S Pashak Feeds Pvt. Ltd. and Anr. [2005(1) Bankmann 194].

ix) Dashrath Rup Singh Rathod vs State of Maharashtra, (2014) 9 SCC 129.

8. The demand notice has been duly served upon the accused/appellant and proved before the Trial Court and in spite of notice being duly served the cheque amount was not paid by the appellant herein.

9. From the evidence on record, this Court finds that the learned Trial Court has considered the materials and the evidence on record in accordance with law and, as such, the said order of conviction being in accordance with law requires no interference by this Court.

10. But the sentence passed by the learned Magistrate is modified to the extent that the substantive sentence of one month is set aside. That being so the sentence as to payment of compensation is to be modified.

11. Section 138 N.I. Act, lays down:-

> *"**138. Dishonour of cheque for insufficiency, etc., of funds in the account.—**Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, **be punished with imprisonment for a term which may extend to [two] years, or with fine which may extend to twice the amount of the cheque, or with both:***
>
> *Provided that ...."*

12. In the present case the petitioner has been convicted and sentenced to pay Rs. 4,00000/- as compensation in default to suffer simple imprisonment for a period of six months.

13. In ***Krishan Gupta & Anr. Vs State of West Bengal & Anr., AIR 2007 (NOC) 2021 (CAL.), decided on 23rd March, 2007,*** the Court held:-

> *"**12.** Last but not least, in the instant case I found the conviction of the appellant under Section 138 of the Negotiable Instruments Act being upheld in appeal and order of sentence of fine being set aside there is nothing except compensation in consequences of conviction. The conviction entails imposition of*

sentence unless imposition of sentence is kept in abeyance by operation of law. The Negotiable Instruments Act provides for sentence of imprisonment and sentence of fine. The compensation is not the part of any sentence neither it is a substitute of sentence but in addition thereto. The provisions of Section 357(3) of the Code makes it abundantly clear that when Court imposes a sentence may order the accused person to pay by way of compensation such amount as may be specified, when fine does not form the part of the sentence. ***Therefore, no compensation can be awarded without being preceded by imposition of sentence and obviously not by imposition of sentence of fine.*** *In the facts and circumstances of this case, I am of the view this case does not deserve to be dealt with under Section 360 of the Code of Criminal Procedure.* ***While the order of conviction stands confirmed, the order of awarding compensation is set aside only on the ground that the same was not preceded by imposition of any sentence****. The case is remanded back to the Trial Court to pass necessary order only on the question of sentence and compensation in accordance with law without being influenced by the fact of the amount of compensation was reduced by the Appellate Court, which was not only otherwise wholly unjustified, but has been set aside by this Court. The Trial Court is further directed to take into consideration the ratio of the decision of the case of Mongilal v. State of M.P. reported in 2004 SCC (Cri) 1058 : 2004 Cri LJ 880 and in the case of Biswajit Chowdhury v. S.S. Distributors reported in 2002 (3) CHN 682."*

14. In ***Somnath Sarkar vs Utpal Basu Mallick & Anr., AIR 2014 SC 771, decided on 7 October, 2013,*** the Supreme Court held:-

"………………… We say so having regard to a three-Judge Bench decision of this Court in Damodar S. Prabhu v. Syed Babalal H. (2010) 5 SCC 663 where this Court briefly examined the object sought to be achieved by the provisions of Section 138 and the purpose underlying the punishment provided therein. This Court has held that unlike other crimes, punishment in Section 138 cases is meant more to ensure payment of money rather than to seek retribution. The Court said:

"17....Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The

complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque." (emphasis supplied) This Court also took note of the number of cases involving dishonor of cheques choking the criminal justice system of this country, especially at the level of the Magisterial Courts, and held that dishonor of cheque being a regulatory offence, aimed at ensuring the reliability of negotiable instruments, the provision for imprisonment extending up to two years was only intended to ensure quick recovery of the amount payable under the instrument. The following passages from the decision are in this regard apposite:

"4...It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, ***the provision for imposing a `fine which may extent to twice the amount of the cheque' serves a compensatory purpose.*** *What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.*

5. Invariably, the provision of a strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts. As per the 213th Report of the Law Commission of India, more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system." (emphasis supplied) We do not consider it necessary to examine or exhaustively enumerate situations in which Courts may remain content with imposition of a fine without any sentence of imprisonment. There is considerable judicial authority for the proposition that the Courts can reduce the period of imprisonment depending upon the nature of the transaction, the bona fides of the accused, the contumacy of his conduct, the period for which the prosecution goes on, the amount of the cheque involved, the social strata to which the parties belong, so on and so forth. ***Some of***

these factors may indeed make out a case where the Court may impose only a sentence of fine upon the defaulting drawer of the cheque. There is for that purpose considerable discretion vested in the Court concerned which can and ought to be exercised in appropriate cases for good and valid reasons. Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant. *In as much as the High Court did so, it committed no jurisdictional error. In the absence of a challenge to the order passed by the High Court deleting the sentence of imprisonment awarded to the appellant, we do not consider it necessary or proper to say anything further at this stage.*

Coming then to the question whether the additional amount which the High Court has directed the appellant to pay could be levied in lieu of the sentence of imprisonment, we must keep two significant aspects in view. First and foremost is the fact that the power to levy fine is circumscribed under the statute to twice the cheque amount. Even in a case where the Court may be taking a lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. That statutory limit is inviolable and must be respected. The High Court has, in the case at hand, obviously overlooked the statutory limitation on its power to levy a fine. It appears to have proceeded on the basis as though payment of compensation under Section 357 of CrPC is different from the power to levy fine under Section 138, which assumption is not correct.

The second aspect relates precisely to the need for appreciating that the power to award compensation is not available under Section 138 of Negotiable Instruments Act. It is only when the Court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages. First, when the Court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court does not appear to have followed that process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it is imposing equivalent to the cheque amount of Rs.69,500/-. That was not the correct way of looking at the matter. Logically, the High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant *out of the same. Viewed thus, the direction of the High Court that the appellant shall pay a further sum of Rs.69,500/- does not appear to be legally sustainable as rightly observed by my erudite Brother Vikramajit Sen, J. I, therefore, entirely agree with my Brother's view that payment of a further sum of Rs.20,000/- towards fine, making a total fine of Rs.1,00,000/- (Rupees one lac) out of which Rs.80,000/- has already been paid as compensation to the complainant, should suffice. The amount of Rs.20,000/- (Rupees twenty thousand) now directed to be paid shall not go to the complainant who is, in our view, suitably compensated by the amount already received by him. In the event of failure to pay the additional amount of Rs.20,000/- the appellant shall undergo imprisonment for a period of six months. With these words, I concur with the order proposed by Brother Vikramajit Sen, J."*

15. In ***Tedhi Singh vs Narayan Dass Mahant, Criminal Appeal No. 362 of 2022 (arising out of SLP (Crl) No. 1963 of 2019), decided on 07th March, 2022,*** the Supreme Court held:-

"12. *However, we would think that in the totality of facts of this case the appellant has not established a case for interference with the finding of the Courts below that the offence under Section 138 N. I. Act stands committed by the appellant. We have been told that the amount of compensation in a sum of Rs.7 Lakhs which is relatable to the cheque amount has been deposited already in the Trial Court. However, we would think that the appellant should be granted relief in the form of substitution of the sentence of imprisonment of one year with a fine. An amount of Rs.5,000/-(Five thousand) commends itself to us as an amount which should suffice as substitution for the imprisonment. Apart from that, we would also direct that a further amount of Rs.15,000/- shall be paid as compensation to the respondent.*

13. *Accordingly, the appeal is partly allowed. While we uphold the conviction, we direct that sentence of imprisonment of one year shall stand vacated. However, the appellant shall stand sentenced to fine of Rs.5,000/- which he will deposit within a period of one month from today in the Trial Court. In case of default, the appellant shall undergo simple imprisonment for a period of one month. The appellant shall also deposit a sum of Rs.15,000/- as further compensation which can be withdrawn by the* *respondent. The deposit shall be made in the Trial Court within a period of four weeks from today.*

The appeal is partly allowed as above.

Pending application(s), if any, stands disposed of."

16. The judgment and order dated 18.03.2017 passed by the learned Additional District & Sessions Judge, (F.T.C. No. II) at Calcutta in Criminal Revision No. 01 of 2015 and the judgment and order of conviction and sentence passed by the learned Metropolitan Magistrate, 19th Court, Calcutta, dated 27.10.2014, in case no. C/16014/2011, convicting and sentencing the petitioner to suffer S.I. for one month and to pay Rs. 4,00,000/- to the complainant as compensation within three months in default to suffer simple imprisonment for a period of six months, is hereby modified to the following extent and affirmed:-

The substantive sentence to suffer S.I. for one month is set aside.

The word 'compensation' is substituted with the word 'fine'. Rest of the judgment and order dated 18.03.2017 passed by the learned Additional District & Sessions Judge, (FTC No. II) at Calcutta, in Criminal Revision No. 01 of 2015 and the judgment and order of conviction and sentence dated 27.10.2014 passed by the learned Metropolitan Magistrate, 19th Court, Calcutta, in case no. C/16014/2011, **remains unchanged.**

17. **The present revisional application is accordingly disposed of.**

18. **Petitioner/accused's bail bonds stand cancelled.**

19. **Petitioner/accused is directed to comply with the judgment and order passed by the trial court within 30 days from the date of communication of this order, in default the trial court shall proceed in accordance with law.**

20. All connected applications, if any, stand disposed of.

21. Interim order, if any, stands vacated.

22. Copy of this order be sent to the learned Trial Court for necessary compliance.

23. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Shampa Dutt (Paul), J.)