

(2022) 12 CAL CK 0036
Calcutta High Court (Appellate Side)
Case No: Criminal Revision No. 908 Of 2009

Arun Kumar Jhajharia

APPELLANT

Vs

State Of West Bengal
& Ors.

RESPONDENT

Date of Decision: Dec. 12, 2022

Acts Referred:

- Negotiable Instruments Act, 1881 - Section 138, 139, 143
- Code Of Criminal Procedure, 1973 - Section 258, 364, 357(3), 372, 386, 389, 390, 391, 401, 401(5), 431
- Indian Penal Code, 1860 - Section 64, 420

Hon'ble Judges: Siddhartha Roy Chowdhury, J

Bench: Single Bench

Advocate: Pawan Kumar Gupta, Sofia Nesar, Santanu Sett, Swarup Banerjee, Arindam Chatterjee, Sajal Kumar Ghosh, N.P. Agarwal, Pratick Bose

Final Decision: Disposed Of

Judgement

Siddhartha Roy Chowdhury, J

1. The petitioner before this Court filed a petition of complaint against Raju Raheman under Section 138 of the N.I. Act alleging inter alia that Raju

Raheman in discharge of his liability and to pay debt, issued an account payee cheque of Rs. 24,000/- vide no. 855091 dated 22nd September, 2006

drawn on Syndicate Bank, Dharmotola Branch in favour of the complainant which was presented and dishonoured for insufficient fund. Demand

notice was sent to the accused person in terms of statutory provision but it was not adhered to. Learned Trial Court after considering the evidence on

record both oral and documentary was pleased to hold the accused person liable to be convicted under Section 138 of the N.I. Act and sentenced him

to suffer simple imprisonment till rising of the Court and directed the convict to pay a sum of Rs. 28,000/- in three installments as compensation. The

complainant felt aggrieved by the said order of learned Trial Court which according to complainant was inadequate and contrary to the intention of the

legislature. Hence filing the criminal revision the complainant is seeking enhancement of sentence.

2. Assailing the impugned order of learned Trial Court Mr. Pawan Kumar Gupta, learned Advocate for the petitioner submits that admittedly in

discharge of his liability the Opposite Party Raju Raheman issued a cheque and he has found guilty by the learned Trial Court for committing an

offence under Section 138 of the N.I. Act. He did not prefer any appeal rather accepted the verdict of learned Trial Court but learned Trial Court did

not pass a sentence which is condign. Therefore, the impugned order of sentence should be altered.

3. To buttress his argument Mr. Gupta relies upon a judgement of Honâ€™ble Supreme Court pronounced in the case of Suganthi Suresh Kumar vs.

Jagdeeshan reported in 2002 (10) SCR 269. According to Mr. Gupta learned Trial Court committed grave error by imposing flee bite sentence which

does not give proper effect to the object of legislation. No drawer of the cheque should be allowed to take dishonour of the cheque issued by him light

heartedly. The very object of enactment of provision like Section 138 of the Act would stand defeated if the sentence imposed by the learned Trial

Court remains unaltered particularly when the cheque amount was not paid by the Opposite Party even during the pendency of the proceeding before

the learned Trial Court.

4. Refuting such contention of Mr. Gupta, Mr. Swarup Banerjee, learned Counsel representing the Opposite Party No. 2 submits that the Opposite

Party is a poor business man who does not have the means to fight the unequal duel with Arun Kumar Jhajharia, the petitioner before this Court. The

Opposite Party Raju Raheman did not have the means to pay Rs. 24,000/- in one go and considering his financial capability learned Trial Court was

kind enough to grant installment to pay the compensation. According to Mr. Banerjee the Opposite Party paid a sum of Rs. 28,000/- in compliance

with the direction of learned Trial Court which has been withdrawn by the petitioner. Therefore, he is estopped from challenging the order of sentence

passed by learned Trial Court. It is further adverted by Mr. Banerjee that enhancement of sentence can be considered in a proceeding under Section

386 of the Criminal Procedure Code in an appeal or under proviso to Section 372 of the Criminal Procedure Code. Revisional application cannot be

entertained at the instance of victim or the complainant as the case may be, shall be relegated to prefer the appeal. To buttress his submission Mr.

Banerjee relied upon a judgement of Honâ€™ble Supreme Court (unreported) pronounced in Criminal Appeal No. 90-93 of 2022, Joseph Stephen &

Ors. vs. Santhanasamy & Ors. According to Mr. Banerjee the proceeding pending before this Court is not maintainable.

5. I have perused the judgement in Joseph Stephen (supra) Honâ€™ble Supreme Court in the said proceeding decided the following questions:-

i) Whether the High Court in exercise of the revisional jurisdiction under Section 401 Cr.P.C. is justified in setting aside the order of acquittal and

convicting the accused by converting the finding of acquittal into one of conviction?;

ii) In a case where the victim has a right of appeal against the order of acquittal, now as provided under Section 372 Cr.P.C. and the victim has not

availed such a remedy and has not preferred the appeal, whether the revision application is required to be entertained at the instance of a party/victim

instead of preferring an appeal; and

iii) While exercising the powers under sub-section (5) of Section 401 Cr.P.C. treating the revision application as petition of appeal and deal with the

same accordingly, the High Court is required to pass a judicial order?

6. In the case of Joseph Stephen (supra) an order of acquittal order of conviction was recorded. Here in this case the petitioner has

approached the Court for enhancement of sentence passed by learned Trial Court after recording an order of conviction against the accused. Section

401 of the Criminal Procedure Code has conferred jurisdiction upon the Court to exercise any of the powers conferred on a Court of appeal by

Section 386/389/390/391 of the Criminal Procedure Code. Section 386 of the Criminal Procedure Code empowers a Court exercising revisional

jurisdiction to enhance and reduce the punishment according to facts of the case. Therefore, the judgement relied upon by Mr. Banerjee is of no help

to the Opposite Party. Mr. Banerjee further adverted that an offence like one committed by Opposite Party is basically a civil wrong that does not

warrant punitive action and to drive his point home, Mr. Banerjee relied upon a judgement pronounced in the case of M/S METERS AND

INSTRUMENTS PRIVATE LIMITED & ORS. VS. KANCHAN MEHTA reported in 2017 AIR SC 4594 wherein Honâ€™ble Supreme Court laid

down the following:-

â€™18. From the above discussion following aspects emerge:

i) Offence Under Section 138 of the Act is primarily a civil wrong. Burden of proof is on Accused in view presumption Under Section 139 but the

standard of such proof is ""preponderance of probabilities"". The same has to be normally tried summarily as per provisions of summary trial under the

Code of Criminal Procedure but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of

Section 258 Code of Criminal Procedure will apply and the Court can close the proceedings and discharge the Accused on satisfaction that the cheque

amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element,

compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found

acceptable to the parties or the Court.

iii) Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that

the complainant has been duly compensated, can in its discretion close the proceedings and discharge the Accused.

iv) Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to

Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised

after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction Under Section 357(3) Code of Criminal

Procedure to award suitable compensation with default sentence Under Section 64 Indian Penal Code and with further powers of recovery Under

Section 431 Code of Criminal Procedure With this approach, prison sentence of more than one year may not be required in all cases.

iv) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the

bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such

affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be

as per Section 264 Code of Criminal Procedure The scheme is to follow summary procedure except where exercise of power under second proviso to

Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation Under Section 357(3) is considered

inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the Accused or any other circumstances.â€

7. In the said judgement Honâ€™ble Supreme Court pointed out that offence under Section 138 of the N.I. Act is primarily a civil wrong and the

object of the provision is compensatory, punitive element is there only for the purpose of enforcing compensatory element. Though Mr. Banerjee

argued that the petitioner has initiated another proceeding under Section 420 of the I.P.C. which was dismissed by learned Trial Court and an appeal

has been preferred by the present petitioner. I do not consider it relevant for the purpose of adjudication of the present revisional application.

8. It goes without saying that every punishment imposed is bound to have an effect on the accused alone but also on the society as a whole. Flee bite

sentence, as imposed upon the Opposite Party is utterly inapt.

9. Had the accused person paid the cheque amount after receipt of the statutory notice issued to him immediately after the cheque was dishonoured or

even if the said amount was paid in time during trial the compensation awarded by the learned Trial Court would have been considered to be just and

proper but the accused person did not show any intention to discharge his obligation by making payment of cheque amount. Learned Trial Court in my

humble opinion has shown misplaced sympathy to the accused person by asking him to pay a sum of Rs. 28,000/- by three installments.

10. The sentence in the form of compensation is not adequate. Though after elapse of 13 years, I do not find any reason to direct the convict Opposite

Party to undergo sentence of imprisonment, but in my view, ends of justice would be met if the compensation amount is enhanced to Rs. 50,000/- from

Rs. 28,000/- which the Opposite Party shall pay within thirty days from the date of this order to the petitioner failing which he shall have to serve

imprisonment for a period of thirty days. In Hari Singh & Anr. vs. Sukhbir Singh & Ors. reported in AIR 1988 SC 2122, Honâ€™ble Supreme Court

held that Court may enforce an order to pay compensation by imposing a sentence in default. The said legal position still continues to hold good.

11. With the aforesaid observation the criminal revision is disposed of.

12. Let a copy of this judgement be sent down to learned Trial Court for information and necessary action.

13. Urgent Photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite

formalities.