

(2019) 03 BOM CK 0032

In the Bombay High Court

Case No : Criminal Writ Petition No. 258, 259, 260 Of 2019

Ajay Vinodchandra Shah

APPELLANT

Vs

State Of Maharashtra & Anr

RESPONDENT

Date of Decision : 14-03-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 143A, 143A(1), 143A(3), 143A(4), 143A(5), 148
General Clauses Act, 1897 — Section 5
Code Of Criminal Procedure, 1973 — Section 357, 357(2), 374, 421, 421(1)
Constitution Of India, 1950 — Article 21, 227

Citation : (2019) 1 DCR 780

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Advocate : Subhash Jha, Harekrishna Mishra, Ankita Pawar, Sanjana Pardeshi, Veera Shinde, Pawan Mishra

Final Decision : Partly Allowed

Judgement

1. Rule. Respondents waive notice through their respective Advocates. By consent of the parties, Rule made returnable forthwith and heard finally at the stage of admission.

2. These Writ Petitions are filed under Article 227 of the Constitution of India challenging the legality and validity of three orders dated 3.8.2018 in Criminal Appeal Nos.491 of 2018, 492 of 2018 and 493 of 2018 passed by the learned Sessions Court directing the petitioner to deposit 25% of the amount of the compensation as a condition precedent to maintain the order of the bail or to entertain the appeal preferred by the petitioner in the Sessions Court and prays that the said orders in the Appeals be quashed and set aside.

3. In all the 3 appeals, cheques of different amounts issued to the complainant were bounced. After conviction, the petitioner filed Appeals challenging those orders. The appellate Court at the time of entertaining the appeal directed the

accused to deposit 25% of the total compensation and if it is not deposited, the order of suspension of sentence is to be automatically vacated.

4. Mr.Jha, the learned Counsel for the petitioner, has submitted that every convict has a right to appeal. Due to imposition of such condition, his right to appeal and bail is taken away. The right to bail should be unconditional. He submitted the provisions of sections 143A and 148 which are enacted on 12.8.2018 and which came into effect from 1.9.2018 are ultra vires to the Article 21 of the Constitution of India. He submitted that when the offence in this matter was committed and the complaint was filed, at that time, these two provisions were not in existence. This being a substantive law, the said provisions cannot be applied retrospectively. He submitted that if the convict has no capacity to pay, then, he is bound to lose his right to an appeal because of such condition of payment of 20% of the amount of the compensation. He has good case on merits, so, imposing such condition is unjust and against the principles of Criminal Jurisprudence of and of Article 21 of the Constitution of India.

5. In support of his submissions, on the point of retrospective effect, he relied on the judgment in the case of Anil Kumar Goel vs. Kishan Chand Kaura (2007) 13 SCC 492 . The learned Counsel also relied on the case of Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. & anr. (2007) 6 SCC 528 .

6. Per contra, the learned APP for Respondent No.1 / State of Maharashtra and the learned Counsel for Respondent No.2 justified the orders of the learned Sessions Judge. They argued that the direction of depositing 20% can be given retrospectively because this is a beneficial legislation which is enacted with an intent to give relief to the complainant. The orders passed by the learned Sessions Judge are in consonance with the scheme of the new provisions under sections 143A and 148 of the Negotiable Instruments Act.

7. Sections 143A and 148 of the Negotiable Instruments Act are reproduced for ready reference:

"143-A. Power to direct interim compensation. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant -

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1), or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the

drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, 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 case being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973 (2 of 1974), shall be reduced by the amount paid or recovered as interim compensation under this section."

148. Power of Appellate Court to order payment pending appeal against conviction. -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), 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 143-A.

(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."

8. The party who commits default in payment can be sued by a payee in the civil Courts by filing suit for recovery of the money. However, the special provision of section 138 under Negotiable Instruments Act is inserted w.e.f. 1.4.1989. The object of Negotiable Instruments Act is to enhance the acceptability of the cheques in settlement liabilities by making the drawer liable for penalties in case

of bouncing of cheques due to insufficiency of funds in the accounts.

9. So, this enactment was made in public interest to keep harmony and credibility in the transactions which are made through negotiable instruments. Therefore, the legislature made it penal act against those dishonest persons who purported to discharge their liability by issuing cheques without really intending to do so. On taking into account how this provision had generated prosecution from 1989 till 2018 under the Act and success of this Act, the Legislature by way of follow-up, has introduced bill No.281 of 2017 to further amend the Negotiable Instruments Act on 2.1.2018. The Legislature has considered the delaying tactics of unscrupulous, dishonest drawers and mounting pendency of the criminal cases and thought of reducing the injustice caused to the payee. Thus, the Ministry of Law by this amendment with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide timely relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money, introduced the bill. So, the Ministry in its statement of objects and reasons has expressed that the proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing the lending institutions including the banks to continue to extend financing to the productive sectors of economy. Sub-clause (2) of clause (1) of the bill reads as follows:

"It shall come into force on such date as the Central Government may by notification in the official gazette, appoint."

10. The Central Government has notified this Act on 1.9.2018. Thus, the issue is whether the provisions can be applied only to those complaints which are filed after 1.9.2018 or the complaints or appeals which are already pending wherein the Courts can pass the orders only after 1.9.2018.

11. In the case of Anil Kumar Goel vs. Kishan Chand Kaura, (supra), the applicant had filed application before the trial Court for discharge from section 138 of the Negotiable Instruments Act. Section 5 of the General Clauses Act states that the day of the operation of any Act shall commence when the assent of the President is received. In the case of Anil Kumar Goel (supra), the Supreme Court has relied on the ratio laid down in the case of Punjab Tin Supply Co. vs. Central Govt. (1984) 1 SCC 206 the Supreme Court held that -

"17. All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous effect will have to be given to the provision in question in accordance with its tenor. If the language

is not clear then the court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not." (See: M/s Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors. AIR 1984 SC 87).

12. The submissions of Mr.Jha that it is to be made applicable prospectively and not retrospectively can be accepted only to the extent of date of passing order by the Judge. The word 'retrospective' is to be understood or read with meaningful, purposive interpretation. It is incorrect to accept that it is to be made not applicable to the cases which are filed only after 1.9.2018 and not applicable to the cases pending earlier in the trial as well as appellate Court. Huge number of cases under section 138 of the Act are pending in the Courts. In these cases, if the plea is recorded or charge is not framed, then, the trial Court can invoke its powers under section 143A after 1.9.2018 and can impose interim compensation which shall not exceed 20% of the amount of cheque. Same is the case in appeals. If the appeals are pending, the Court can pass interim orders under section 148, which states - "the appellate Court may order the appellant to deposit such sum which shall be a minimum twenty percent of the fine or compensation awarded by the trial Court."

13. On comparison of the language used in sections 143A and 148, one finds a difference. U/s 143A, the accused is yet to face a trial. Under subsection (2) thereof, the interim compensation under sub-section (1) shall not exceed twenty percent of the amount of the cheque. However, under section 148, it is stated that the Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent of the fine." These clauses in these two sections reflect the intention of the Legislature that a person at the stage of trial is always considered innocent till he is found guilty and, therefore, the ceiling of 20% compensation is mentioned. However, in the appeal, when the first Court holds the accused guilty and thus, once he is convicted, then, the appellate Court is given the power to pass order directing the accused to deposit the amount which shall be a minimum of 20% of the fine or compensation awarded by the trial Court. It is further stated in section 148 that the amount payable under this subsection shall be in addition to any interim compensation paid by the appellant under section 143A.

14. The Legislature has also taken care of the accused if at all he is not held guilty and acquitted either at the trial or in the appeal. The subsection (4) of section 143A and the proviso to section 148 state about the repayment of the amount by the complainant to the accused. In the event of acquittal, the said amount also to be paid within 60 days from the date of the order. The submissions of Mr.Jha that it is to be made prospectively applicable to the cases only which are filed after 1.9.2018 is not sustainable.

15. It is useful to compare the two sections i.e., 143-A and 148 of the Negotiable Instruments Act in a tabular format to get a quick grasp. The grant of interim relief is a common thread running through both the sections. However, they are

not identical. The terms and clauses used by the Legislature while drafting these two sections, provide internal aid to understand the sections.

Sr. No.

Section 143A of the N.I. Act

Section 148 of the N.I. Act

1.

The order of payment of interim compensation.

The order of depositing the sum out of fine or compensation.

2.

Upper limit is maximum 20% of the cheque amount.

Lower limit is minimum 20% of the amount of fine or compensation.

3.

The order is of payment made directly to the complainant.

The Court may direct to release the amount which is deposited to the complainant.

4.

If the order of payment is made, the accused shall pay within a period of 60 days and for special reason, further 30 days hence within 90 days.

Same provision is made. Maximum 60 days and for special reason, further 30 days for depositing the amount.

5.

(i) In summary trials at the stage of plea if not pleaded guilty (ii) upon framing of charge in any other case.

The order directing to deposit the money can be passed any time during the appeal.

6.

Sub section (4) of 143-A states about recovery of the money with interest from the complainant in case of acquittal of the accused within a period of 60 days or maximum 90 days.

In proviso of section 148, similar provision is made for the recovery of money with interest from the complainant in case of acquittal of the accused within a period of 60 days or maximum 90 days.

7.

Sub section (5) of section 143- A, the provisions of recovery of interim compensation should be as if a fine under section 421 of the Cr.P.C.

No such provision is mentioned but to be governed by the provisions of Code of Criminal Procedure.

16. U/s 357 of the Code of Criminal Procedure, the criminal trial Court has power to grant compensation to the complainant. Thus, the power to give compensation is already in existence with the criminal Court before amendment also. However, by way of amendment, at what stage the amount of compensation can be granted is made clear in this special statute. The compensation is directed at the end of the trial if the accused is found guilty. However, the said stage is preponed by enacting section 143A(4) and proviso to section 148 of the Act enabling Courts to grant compensation on condition as mentioned therein. Both the sections start with non-obstante clauses giving overriding effect to Criminal Code.

17. Mr.Jha has challenged the order mainly on the ground that in the event of failure in payment of fine or compensation, the bail would be cancelled. Whether such condition depriving the accused of his liberty can be imposed under section 143A or 148 of the Negotiable Instruments Act is the issue raised by Mr.Jha. This issue can be answered on the background of the discussion above and on the basis of the ratio laid down by the Supreme Court in the case of Anil Kumar Goel (supra) and Dilip S. Dahanukar (supra). Right to appeal is a statutory right and it protects the liberty of the convicted accused and provided further forum to agitate the issue of the liberty of the accused. The right to appeal is considered a fundamental right under Article 21 of the Constitution of India.

18. In the landmark case of Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. & anr. (supra), the Supreme Court has discussed and explained the scope of section 357(2) of the Code of Criminal Procedure in the offence under section 138 of the Act. The said case was mainly on the power to impose the sentence or fine and compensation, where the Court held that right of appeal is indisputably statutory right provided under section 374 of the Code of Criminal Procedure and especially the right of bail from the judgment and conviction affecting liberty of a person keeping in view the expansive definition of Article 21 is also fundamental right and, therefore, that right to appeal cannot be interfered with or impaired nor can be subjected to any condition. In the said case, the Supreme Court relied on the case of Garikapati Veeraya vs. N. Subbiah Choudhry AIR 1957 SC 540, wherein it is held that "the right of an appeal is not a mere matter of procedure but it is a substantive right" and "this vested right to appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise". Further, the Supreme Court held in paragraphs 56 to 60 thus:

"56. An order may not be passed which the appellant cannot comply with resulting him being sent to prison. The appellate Court, in such cases, must make an endeavour to strike a balance. Section 421 of the Code of the Criminal

Procedure may take recourse to, but therefor he cannot be remanded to custody.

57. The Parliament has dealt with the imposition of substantive sentence and a sentence of fine vis-à-vis payment of compensation differently.

58. A penal statute, in the event, the different meanings are possible to be given, must be construed liberally in favour of an accused.

59. While the court shall give due weight to the need of the victim, it cannot ignore the right of an accused. In a case of conflict, construction which favours the accused shall prevail.

60. In a case of this nature, the court must invoke the doctrine of purposive construction. Sub-section (2) of section 357 was enacted for a definite purpose. It must be given its full effect."

(emphasis added)

19. The direction of payment of compensation if passed at the stage of plea or framing of charge and if he fails to comply with such direction, then, what is its effect. Subsection (3) of Section 143A states that the interim compensation shall be paid within sixty days from the date of the order under subsection (1). However, subsection (1) of section 143A states that the Court may order the drawer to pay interim compensation. So, it leaves discretion to the trial Court to pass such order of interim compensation and if such interim direction is given, the ceiling limit under section subsection (2) of 20% of the cheque amount is prescribed. The period of payment is 60 days and can be extended for a further period of 30 days. Subsection (4) is about return of the amount of compensation in the event of acquittal. Subsection (5) of section 143A refers to section 421 of the Code of Criminal Procedure. It states that the interim compensation payable under this section may be recovered as if it is a fine under section 421 of the Code of Criminal Procedure. Thus, for the purpose of recovery, this interim compensation takes a colour of fine.

20. Section 421 reads as under:

"421. Warrant for levy of fine.

(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of

such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.

(2)

(3)

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

Section 421 of the Code of Criminal Procedure is in part C of Chapter XXXII. The Chapter XXXII is about execution, suspension, remission, commutation of sentences. Levy of fine is a separate Part C. Thus, section 421 lays down the procedure how the fine is recoverable. Any other mode of levying the fine cannot be adopted except the procedure laid down under section 421 of the Code of Criminal Procedure. Section 421 comes in operation after the person is convicted and the fine is imposed. It also states that when there is an order of payment of fine and in default order of further imprisonment is made and if the person has undergone that imprisonment, then, the fine cannot be levied as mentioned in the first part of section 421 unless some special reason is mentioned about payment of compensation out of the said fine. For recovery of the compensation or fine, mode under clauses (a) and (b) of subsection (1) of section 421 of the Code can be followed but no such condition like imprisonment on its failure to pay can be imposed. Hence, it is unjust and illegal to impose the condition of cancellation of bail or cancellation of suspension of sentence of the accused if fine or compensation is not paid under section 143A and 148 of the Negotiable Instruments Act.

21. Let me advert to the powers of the appellate Court under section 148, pending appeal against conviction. The recovery of compensation granted under section 148 can be necessarily done by following the procedure laid down and available under section 357 of the Code of Criminal Procedure and amount of fine is recoverable by following procedure under section 421 of the Code. The Section is worded as 'appellate Court 'may' order'. Thus, it gives discretion to the appellate Court to invoke its discretionary power under section 148 while directing to deposit 20% of the amount of fine or compensation. In this clause, both the words 'may' and 'shall' are present. The words in section 148 - the appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent. Hence, by literal meaning of this sentence; discretion is given to the appellate Court to direct the appellant to deposit the sum but if at all such direction is given, that sum should not be less than 20% of the amount of fine or compensation awarded by the trial Court. Thus, the court has discretion and it may not pass the order but if the order is passed, then, the minimum amount payable should be 20% of the fine or compensation.

22. The grievance is made by Mr.Jha that if the accused has no capacity to pay

the amount under section 148 pending appeal, then, the accused should not be deprived of his right to appeal or his right to be on bail. It is true and correct that if the accused is on bail throughout the trial and when the offence is bailable, the statutory appeal is provided and if the offence is bailable, then his right to be on bail and enjoy his liberty throughout the appeal period should not be taken away unless some special ground is made out. It is a fundamental right protected under Article 21 of the Constitution of India. However, the submissions of Mr.Jha that the section is ultra vires is not sustainable in these Criminal Writ Petitions.

23. The criminal Courts have powers to impose various conditions at the time of granting bail, in the trial and also at the appellate stage. In appeal, the accused is not innocent but he is held guilty by the first Court. Thus, though his liberty is to be protected, simultaneously, the Court's powers to do justice to the complainant at the same time cannot be shadowed. The appellate Court hence to strike balance of these two circumstances by adopting a reasonable view. The provision of section 148 is in consonance with the power vested with the appellate Court which can impose some conditions at the time of granting bail or at the time of admission of appeal. However, the right to appeal and his liberty cannot be taken away but to be protected by applying the principle of reasonability while imposing conditions. I rely on the ratio laid down in the case of Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. & anr. (supra).

24. In Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. & anr. (supra), it is held in paragraphs 68, 69, 70 and 72 thus:

"68. It is also of some significance to note that whereas under Section 357(1) of the Code of Criminal Procedure, a fine of Rs.5000/- can be imposed; fine in terms of Section 357(2) thereof can be twice the amount of cheque whereas there is no upper limit for award of a compensation. But the same would be subject to other provisions of the Code of Criminal Procedure which mandates that the amount of fine imposed on an accused cannot be more than Rs.5000/-. The very fact that the Parliament did not think it fit to put a ceiling limit in regard to the amount of compensation leviable upon an accused, the discretionary jurisdiction thereto must be exercised judiciously. Ordinarily, an accused shall not be taken in custody during trial. Thus, while exercising the appellate power, ordinarily, a person should not suffer imprisonment only because the conditions imposed for suspending the sentence are harsh.

69. We are of the opinion that having regard to the aforementioned factors the amount of compensation not only must be reasonable one, the conditions for suspending the sentence should also be reasonable. It is only with that intent in view, the doctrine of purposive construction should be applied.

70. We would, however, like to put a note of caution that the right of an accused unnecessarily need not be enlarged but it is the court's duty to duly protect his right.

71. We are prima facie of the opinion (without going into the merit of the appeal)

that the direction of the learned trial Judge appears to be somewhat unreasonable. The appellant herein has been sentenced to imprisonment. Only fine has been imposed on the Company. Thus, for all intent and purpose, the learned trial Judge has invoked both sub-sections (1) and (3) of Section 357 of the Code. The liability of the appellant herein was a vicarious one in terms of Section 141 of the Negotiable Instruments Act. The question may also have to be considered from the angle that the learned trial Judge thought it fit to impose a fine of Rs.25,000/- only upon the Company. If that be so, a question would arise as to whether an amount of compensation for a sum of Rs. 15 lakhs should have been directed to be paid by the Chairman of the Company. We feel that it is not.

72. We, therefore, are of the opinion :

- i) in a case of this nature, sub-section (2) of Section 357 of the Code of Criminal Procedure would be attracted even when Appellant was directed to pay compensation;
- ii) the Appellate Court, however, while suspending the sentence, was entitled to put the appellant on terms. However, no such term could be put as a condition precedent for entertaining the appeal which is a constitutional and statutory right;
- iii) the amount of compensation must be a reasonable sum;
- iv) the Court, while fixing such amount, must have regard to all relevant factors including the one referred to in Sub-Section (5) of 357 of the Code of Criminal Procedure;
- v) no unreasonable amount of compensation can be directed to be paid."

25. Thus, the condition imposed at the time of pending appeal of the payment of the amount of compensation should not curtail the liberty of the appellant/accused. Such condition if not fulfilled, then, amount is recoverable finally, if the conviction is maintained. The amount can be recoverable with interest. If conviction is confirmed, the order of a higher rate of interest or commercial rate of interest, may be passed; or in default maximum sentence may be imposed. Moreover, the fine or compensation is made recoverable as per the provision of section 421 of Code of Criminal Procedure.

26. In the present case, the impugned orders are passed on 3.8.2018 by the learned Magistrate and the amendment came into force on 1.9.2018. Obviously, in the order dated 3.8.2018, section 148 is not mentioned by the learned Additional Sessions Judge. He did not intend to pass the order under section 148 but it is to be understood that the learned Sessions Judge passed the order under Code of Criminal Procedure by using the powers of the criminal Court to impose putting condition at the time of granting bail. Such a condition of bail can be imposed or it can be modified for non-compliance of the condition in view of the nature of the offence and the circumstances.

27. Therefore, the orders dated 24.9.2018 imposing a condition that the accused

to deposit 25% amount out of total compensation, are modified that the petitioner/accused is directed to deposit 20% of the total amount of the compensation. The stipulated time of 60 days to deposit the said amount is extended till 90 days as this litigation was going on. If it is not deposited within the 90 days, the accused will have to pay interest at the rate of 18% from the date of this order, if the conviction is maintained finally.

28. The orders of putting conditions of cancellation of bail or suspension of sentence in the event of non-payment are set aside.

29. Writ Petitions are accordingly partly allowed and disposed of as such.