

(2020) 05 GAU CK 0009

In the Gauhati High Court

Case No : Criminal Petition No. 87 Of 2019

Bolin Borgohain

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 13-05-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 374(3), 389, 482
Negotiable Instruments Act, 1881 — Section 138, 148

Citation : (2020) 05 GAU CK 0009

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : S Mitra

Final Decision : Dismissed

Judgement

1. Heard Mr. S. Mitra, learned counsel for the petitioner; Mr. B. B. Gogoi, learned Additional Public Prosecutor for the respondent no. 1, State of Assam and Mr. B. Dekha, learned counsel for the respondent no. 2.

2. The petitioner in this criminal petition filed under Section 482, Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code' and/or 'CrPC', for short) has challenged the legality and validity of an order dated 17.12.2018 passed by the learned Additional Sessions Judge (F.T.C.), No. 3, Kamrup (M), Guwahati in Criminal Appeal Case no. 191/2018. Two of issues that have arisen for consideration in this case are : firstly, whether Section 148 of the Negotiable Instruments Act, 1881 (hereinafter referred as 'the Act', for short) which had come in force w.e.f. 01.09.2018 by the Amendment Act 20 of 2018 is retrospective or prospective and secondly, whether an appellate court in an appeal preferred against a judgment and order of conviction and sentence for an offence under Section 138 of the Act is to assign any reason while directing the appellant to deposit an amount in terms of the provisions of Section 148 of the Act.

3. In order to appreciate the issues, a brief narration of the events which had led to passing of the impugned order dated 17.12.2018 appears necessary.

3.1 A complaint case came to be instituted before the Court of Chief Judicial Magistrate, Kamrup (M), Guwahati by the respondent no. 2-complainant (hereinafter referred to as 'the complainant', for short) alleging commission of an offence under Section 138 of the Act. The said complaint was registered and numbered as C.R. Case No. 78C/2015. It was projected therein that both the complainant and the accused who is the petitioner here, are businessmen. In the year 2011, the accused approached the complainant for a personal loan of Rs. 9,00,000/-. The complainant paid the amount of Rs. 9,00,000/- in two instalments on 15.06.2011 and 25.10.2011. For the purpose of repayment of the said loan the accused issued 4 (four) nos. of account payee cheques drawn on an account maintained by him with State Bank of India, Beltola Branch. The said 4 (four) nos. of cheques were dated 20.09.2014, 27.09.2014, 25.10.2014 & 25.10.2014 respectively. The complainant presented all the 4 (four) cheques for collection on 04.11.2014 but the cheques were returned unpaid with remarks - 'insufficiency of fund' and 'no seal'. The complainant thereafter, sent a legal notice through his advocate to the accused on 29.11.2014. It was asserted that the notice was duly served on the accused on 01.12.2014 and in response to the said notice, the accused had also sent a reply on 17.12.2014 stating, inter-alia, that he had already paid the amount of Rs. 9,00,000/- to the complainant by cash as well as by cheques.

3.2. On receipt of the said complaint, the same was registered as C.R. Case no. 78/2015 and forwarded to the Court of Sub-Divisional Judicial Magistrate, II, Kamrup (Metro), Guwahati ('the trial Court', for short) for disposal. The learned trial court took cognizance of the offence under Section 138 of the Act and issued process against the accused for his appearance. On receipt of summons, the accused entered his appearance. When the particulars of the offence were stated to him, he pleaded not guilty and claimed to be tried.

3.3. In the course of trial that followed, the complainant examined himself as P.W.-1 and exhibited 7 (seven) nos. of documents in support of his case. Thereafter, the accused was examined under Section 313, CrPC and he desired to adduce evidence. The accused examined as himself as D.W.-1 and exhibited 3 (three) nos. of documents in support of his case.

3.4. After conclusion of the trial, the learned trial court found the accused guilty of the offence under Section 138 of the Act. By a judgment and order dated 19.11.2018, the trial court convicted the accused under Section 138 of the Act and he was sentenced to undergo simple imprisonment for 2 (two) years and to pay a compensation of Rs. 18,00,000/- to the complainant, in default of payment of the said compensation, to undergo simple imprisonment for another 2 (two) months.

3.5. Being aggrieved by and dissatisfied with the said judgment and order dated

19.11.2018, the petitioner as the appellant, had preferred an appeal under Section 374(3) of the Code before the Court of learned Sessions Judge, Kamrup at Guwahati. The said appeal was registered and numbered as Criminal Appeal Case no. 191/2018 and the appeal was forwarded to the Court of Additional Sessions Judge (F.T.C.) No. 3, Kamrup (Metro), Guwahati ('the appellate court', for short) for disposal.

3.6. When the appeal came up for consideration before the appellate court on 17.12.2018, the appellate court heard the submission of the learned counsel for the accused-appellant. After going through the memo of appeal and hearing the submission of learned counsel, the appeal was admitted and notice was issued to the respondent-complainant. The record of C.R. Case No. 78/2015 was called for from the trial court.

3.7. On a prayer made on behalf of the accused-appellant, the appellate court suspended the operation of the impugned judgment and order of the learned trial court, subject to deposit 20% of the total compensation awarded by the trial court within the next date fixed on 18.02.2019.

4. It is that part of the order whereby the appellate court has directed the convicted accused-appellant i.e. the petitioner herein to deposit 20% of the compensation amount of Rs. 18,00,000/- within 18.02.2019, which is assailed in this criminal petition.

5. Mr. Mitra, learned counsel for the petitioner has submitted primarily on two aspects, firstly, in the provision of Section 148 of the Negotiable Instruments Act, 1881 which has been inserted w.e.f. 01.09.2018 by amendment, the use of the word "may" has given discretion to the appellate court for direction to deposit less than the minimum of 20% of the fine or compensation awarded by the trial court. Thus, the said provision is not mandatory and secondly, the petitioner as the accused, had adduced evidence before the learned trial court wherein he had exhibited 3 (three) nos. of documents before the trial court in support of his contention that he had paid the amount borrowed from the complainant in the meantime. But the said evidence was not considered and appreciated in the proper perspective by the learned trial court. When that aspect was brought to the notice of the appellate court, the same was not considered by the appellate court while passing the impugned order dated 17.12.2018.

6. Mr. Deka, learned counsel for the respondent no. 2-complainant has submitted that the issue regarding retrospectivity of the provision of Section 148 of the Act is no longer res integra in view of the decision of the Supreme Court in Surinder Singh Deswal Alias Colonel S. S. Deswal and others vs. Virender Gandhi, reported in (2019) 11 SCC 341. He has submitted that the issue regarding discharge of debt or liability by the accused had been considered by the learned trial court and the same was not found acceptable. Thus, the said issue cannot be agitated before this Court in a criminal petition preferred under Section 482 of the Code challenging an order where the appellate court had directed the

appellant to deposit 20% of the compensation amount in terms of the provision contained Section 148 of the Act.

7. Mr. Gogoi, learned Additional Public Prosecutor for the State has submitted in similar lines as Mr. Deka.

8. I have considered the submissions of the learned counsel for the parties and perused the materials made available on record.

9. In so far as the issue as to whether the provision of Section 148 of the Act is prospective or retrospective in nature is concerned, it is found that the said issue is no longer res integra in view of the decision of the Supreme Court in Surinder Singh Deswal (supra). The background facts in Surinder Singh Deswal were of similar nature like the case in hand. In Surinder Singh Deswal, (2019) 11 SCC 341 (supra), when the accused preferred an appeal before the appellate court challenging his conviction under Section 138 of the Act the appellate court while suspending the sentence and allowing an application under Section 389 of the Code, directed the appellants to deposit 25% of the compensation awarded by the trial court. The criminal complaint cases in Surinder Singh Deswal were filed prior to 01.08.2018 and the judgments and orders were passed by the trial court on 30.10.2018.

9.1. The Supreme Court in its judgment and order dated 29.05.2019 in Surinder Singh Deswal, (2019) 11 SCC 341 (supra) has observed as under :-

"7. It is the case on behalf of the appellants that as the criminal complaints against the appellants under Section 138 of the NI Act were lodged/filed before the Amendment Act No. 20 of 2018 by which Section 148 of the NI Act came to be amended and therefore amended Section 148 of the NI Act shall not be made applicable. However, it is required to be noted that at the time when the appeals against the conviction of the appellants for the offence under Section 138 of the NI Act were preferred, Amendment Act No. 20 of 2018 amending Section 148 of the NI Act came into force w.e.f. 1-9-2018. Even, at the time when the appellants submitted application(s) under Section 389 of the Code of Criminal Procedure to suspend the sentence pending appeals challenging the conviction and sentence, amended Section 148 of the NI Act came into force and was brought on statute w.e.f. 1-9-2018. Therefore, considering the object and purpose of amendment in Section 148 of the NI Act and 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 learned trial court, the same can be said to be absolutely in consonance with the Statement of Objects and Reasons of amendment in Section 148 of the NI Act.

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, the 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 accused-appellant to deposit such sum 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 NI Act, it cannot be said that any vested right of appeal of the accused-appellant has been taken away and/or affected. Therefore, submission on behalf of the appellants that amendment in Section 148 of the NI Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to 1-9-2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the NI Act, no substantive right of appeal has been taken away and/or affected. Therefore, the decisions of this Court in the cases of Garikapatti Veeraya and Videocon International Limited, relied upon by the learned Senior Counsel appearing on behalf of the appellants shall not be applicable to the facts of the case on hand. Therefore, considering the Statement of Objects and Reasons of the amendment in Section 148 of the NI Act stated hereinabove, on purposive interpretation of Section 148 of the NI Act as amended, we are of the opinion that Section 148 of the NI Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under Section 138 of the NI Act, even in a case where the criminal complaints for the offence under Section 138 of the NI Act were filed prior to amendment Act No. 20 of 2018 i.e. prior to 1-9-2018. If such a purposive interpretation is not adopted, in that case, the object and purpose of amendment in Section 148 of the NI Act would be frustrated. Therefore, as such, no error has been committed by the learned first appellate court directing the appellants to deposit 25% of the amount of fine/compensation as imposed by the learned trial court considering Section 148 of the NI Act, as amended.

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 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 of the Code of Criminal Procedure 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, the 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."

9.2. In another set of litigation preferred by the same appellants in *Surinder Singh Deswal alias Colonal S. S. Deswal and others vs. Virender Gandhi and another*, reported in (2020) 2 SCC 514 the Supreme Court has reiterated and affirmed its earlier observations made in *Surinder Singh Deswal*, (2019) 11 SCC 341 (supra). It has further been held that when suspension of sentence passed by the trial court is granted with a condition, non-compliance of the condition has adverse effect on the continuance of the suspension of the sentence. The court which has suspended the sentence on a condition, after noticing non-compliance of conviction can hold that the suspension of sentence stands vacated due to non-compliance. The decision of the Bombay High Court in *CrI. W.P. Nos. 258 to 260 of 2019 (Ajay Vinodchandra Shah vs. State of Maharashtra and another)* decided on 14.03.2019 on which Mr. Mitra has placed reliance, has been found to be not a good law in so far as the consequences of non-compliance of condition of suspension is concerned, by *Surinder Singh Deswal*, (2020) 2 SCC 514 (supra).

10. In so far as the submission advanced on behalf of the petitioner as regards discretion available to the appellate court under Section 148 of the Act to make a departure from the condition of deposit of not below 20% of the fine/compensation amount awarded by the learned trial court is concerned, it is observed already in the aforesaid decisions in *Surinder Singh Deswal* (supra) the use of the word "may" in the amended Section 148 of the Act is to be construed as a "rule" or "shall". Thus, what can be culled out from the said observation is that the direction to deposit minimum of 20% of the fine or compensation

awarded by the trial Court is "rule". If the appellate court decides to dispense with the condition of deposit of minimum 20% of the fine or compensation awarded by the trial court then it has to assign special reasons for dispensing with such deposit. Thus, a direction to deposit a part of the fine or compensation amount awarded by the trial court is the "rule" and a direction to make any relaxation of such a condition is an exception, which can only be passed assigning special reasons by the appellate court.

11. On a query made by this Court, the learned counsel for the petitioner has submitted that no separate application under Section 389 of the Code was filed when the appeal was presented and the appeal was heard for admission on 17.12.2018. What was available before the appellate court on that day was the memorandum of appeal presented by the petitioner. The materials before the appellate court available on that date were the grounds taken in the memorandum of appeal. On perusal of the memorandum of appeal, furnished by Mr. Mitra, it is found that no special reasons or circumstances had been cited therein for the appellate court to consider the matter of dispensing with the condition to deposit a part of fine or compensation amount in terms of Section 148 of the Act. The grounds taken in the memorandum of appeal are, in general, pertaining to the impugned judgment and order of the learned trial court regarding failure to appreciate the evidence in the right and proper perspective. It is not necessary for the appellate court to find out any special reason on its own to make a departure from making a deposit of less than 20% of the fine or compensation awarded, under Section 148 of the Act. Non-assignment of any reason while directing deposit of 20% of the total compensation amount awarded by the trial court, has not made not the order dated 17.12.2018 of the appellate court infirm in any manner. Thus, the submission advanced by the learned counsel for the petitioner does not merit consideration.

12. In so far as the other limb of submission of the petitioner is concerned, it is a settled position of law that an appeal, in essence, is continuation of the proceeding of the original court. Ordinarily, the appeal jurisdiction involves a re-hearing on law as well as on facts when the same is invoked by an aggrieved person. The appellate jurisdiction is co-extensive with the original court's jurisdiction as for appraisal and appreciation of evidence. It is free to redress the errors, if any, committed by the trial court and to reach its own findings on law and facts. The grounds taken up by the petitioner as the appellant in Criminal Appeal Case no. 191/2018 would be obviously be considered by the appellate court. The appellant is at liberty to advance his submissions as regards the discharge of the debt or liability by him which he had advanced before the trial court which, according to him, were not properly considered by the trial court. This Court in exercise of its jurisdiction under Section 482 of the Code while considering the legality and correctness of the impugned order dated 17.12.2018, does not function as a court of appeal to appreciate and evaluate the evidence adduced by the parties before the trial court. Therefore, the second limb of submission of the petitioner requires no consideration and does not merit

acceptance.

13. In the light of the discussion made above, I find no merit in this petition. The interim order dated 28.01.2019 stands re-called. The petitioner shall comply with the direction of the appellate court made in the order dated 17.12.2018. It is, however, observed that the period contemplated under Section 148 of the Act shall exclude the period from 28.01.2019 till date. In view of the current lockdown declared by the Central Government as well as by the State Government due to Covid-19 Pandemic, liberty is granted to the petitioner to make an application as regards extension of the time period for the deposit of the amount and if such an application is filed before the appellate court, the appellate court shall consider the same on its own merit by taking the facts and circumstances prevailing on the date of such consideration. The parties are directed to appear before the appellate court on 01.06.2020. It is provided that till 01.06.2020, the sentence passed by the learned trial court shall remain suspended and extension of such suspension will be considered by learned appellate court upon appearance of the parties on 01.06.2020. There shall be no order as to cost.