

(2016) 07 GUJ CK 0060

In the Gujarat High Court

Case No : Criminal Revision Application (Against Conviction - Negotiable Instrument Act) No. 333 of 2016 with Criminal Revision Application No. 334 of 2016 to Criminal Revision Application No. 336 of 2016

Rajnikant Nathalal Maniar

APPELLANT

Vs

Jagdish Jasvantlal Patwa

RESPONDENT

Date of Decision : 05-07-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2016) ACD 962 : (2017) 1 Civil LJ 525 : (2017) 1 GCD 37 : (2016) 4 GLR 3255 : (2016) 3 GLR 2684 : (2017) 2 RCRCivil 98 : (2017) 2 RCRCriminal 180

Hon'ble Judges : S.G. Shah, J.

Bench : Single Bench

Advocate : D.K. Puj, Advocate, for the Applicants No. 1; Mrudul M. Barot, Advocate, for the Respondents No. 1; Manan Mehta and K.P. Raval, APP, for the Respondents No. 2

Final Decision : Dismissed

Judgement

S.G. Shah, J. - Rule. Service of rule is waived by Mr. Mrudul Barot, Ld. Advocate and Mr. Manan Mehta & Mr. Raval, Ld. APP for respondent nos. 1 and 2 respectively.

2. All these revision applications are between the same parties and though arising out of different impugned orders in different appeals, practically in all the matters, similar law point is involved and, therefore, though the petitioner has to prefer four separate revision applications because of four separate impugned orders in four separate Criminal Appeals arising out of four separate Criminal Cases, they are heard together and are decided by this common judgment. Even parties have also submitted only one set of arguments in all such matters.

3. Therefore, four revision applications are decided by this common judgment.

Hence Registry shall keep copy of this judgment in all the matters.

4. The petitioner in all the revision applications is facing an order of conviction under the Negotiable Instruments Act [for short 'NI Act'] in all such revision applications, because the petitioner has issued four different cheques in favour of the respondent-complainant and, therefore, when all such cheques were bounced and remained unpaid by the petitioner's bank, the complainant has filed complaint under section 138 of the NI Act before the Court of Metropolitan Magistrate, Ahmedabad. Such Court has by impugned order dated 29/3/2016, after full-fledged trial, convicted the present petitioner and awarded sentence of simple imprisonment [SI] for one year with fine of Rs. 5,000/- and in default of payment of fine, further SI for two months.

5. The petitioner has challenged such conviction by filing respective appeals before the City Sessions Court at Ahmedabad. With such appeals, the petitioner has also filed applications for bail.

6. However, while granting the bail by its order dated 26/4/2016, the City Sessions Court has imposed a condition that the petitioner should be released on bail till hearing and final disposal of such Criminal Appeal on depositing Rs. 7,50,000/- before the trial Court and on executing personal bond of Rs. 20,000/- with a surety of like amount to the satisfaction of the trial Court, with some regular conditions like marking presence before the Court on every date of hearing, not to leave local limits of Gujarat without prior permission of the Court, not to misuse his liberty, etc.

7. Being aggrieved by such conditional order of bail, the petitioner has challenged such order dated 26/4/2016 by filing present revision applications.

8. The sum and substance of arguments of the learned advocate for the petitioner is to the effect that filing of an appeal by the accused person is his constitutional and legal right and, therefore, when right to appeal is provided in the statute, the petitioner is also entitled to be released on bail. Therefore, such order of bail should not be conditional one as purported in the impugned judgment and same needs to be quashed and set aside.

9. In support of his such submission, learned advocate for the petitioner is mainly relying upon the decision of the Hon''ble Supreme Court rendered in the case of Dilip S. Dahanukar v. Kotak Mahendra Company Ltd. Reported in [2007] 6 SCC 528 and other judgments referred in such citation.

10. If we peruse such decision, it becomes clear that practically the Hon''ble Supreme Court has discussed so many judgments and other details mainly for interpretation of section 357 of the Criminal Procedure Code, 1973 [for short 'the Code'] vis-a-vis the provisions of NI Act with reference to the power to impose fine, but with due respect to the decision of the Hon''ble Supreme Court, it is to be recollected here that the provisions of section 357 of the Code is mainly with reference to the powers of the Court to order to pay compensation

and not with regard to imposition of fine. Generally the powers to impose fine for the offences under the Indian Penal Code [IPC] are conferred in the Penal Code itself. Similarly, under section 138 of the NI Act, there is a provision to impose fine which can be upto double the amount of the cheque in question as against different specific amount of fine for different offences in other enactments including IPC. Therefore, the powers of the Court in imposing fine under section 138 of the NI Act is altogether different and unlimited, but restricted to the amount of cheque, which can be different in different cases. Therefore, if the amount of cheque for which complaint under section 138 of the NI Act is filed and proved is Rs. 100/-, then the Court has power to impose fine of Rs. 200/-. But if the amount of cheque in such complaint is of any higher amount, say Rs. 1 crore, then the Court has power to impose fine of Rs. 2 crores. Therefore, imposition of any amount as fine under the NI Act cannot be termed as harsh based upon the actual figure in such condition because it would vary from case to case and in a given case, it may be much more, but it cannot be said that only because of direction to deposit huge amount, it amounts to harsh condition so as to refuse bail to the convict pending appeal and, therefore, order of bail should not contain such condition.

11. To be more precise, let us examine the wording of section 138 of the NI Act, wherein the relevant portion reads thus :

"..... Such person shall be deemed to have committed an offence and therefore, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extent twice the amount of cheque or with both;"

Whereas section 357 of the Code of Criminal Procedure provides for order to pay compensation; to be paid to the victim from the amount of fine that may be imposed upon the accused. But subsection [3] of section 357 specifically provides that when a Court imposes sentence, which does not include fine as a part of it, the Court may, by way of compensation, order the accused to pay such amount as may be specified in the order, to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. However, such order to pay compensation can be passed at the time of passing the judgment of the appeal because pursuant to sub-section [2] of section 357, if fine is imposed in a case which is subject to appeal, though compensation can be paid to the victim from the amount of such fine, no such payment shall be made before the period allowed for presenting the appeal, has been elapsed or before the decision of the appeal.

12. Whereas sub-section [4] of section 357 of the Code entitles the High Court or Sessions Court to pass any such order even while exercising its power of revision. Therefore, one thing is clear and certain that irrespective of imposition of fine or imposition of meagre amount as a fine in an order of conviction by the trial Court, the High Court and Sessions Court can award the compensation which may be only with a rider that payment of which can be made to the victim

only at the time of deciding the appeal.

13. Whereas so far as releasing the accused on bail is concerned, now accused-petitioner has to apply for bail as per the provisions of section 389 of the Code and thereupon provisions of the Criminal Procedure Code pertaining to bail would apply which empower the Court to impose such other conditions as it considers necessary, more particularly now when such appellant is not simply accused but is a convict; thereby there is something more than prima-facie evidence against him. In simple words, before conviction, the prima-facie evidence is yet to be proved by the complainant; whereas after conviction, it is to be considered that there is evidence against the convict to award him conviction. But only because there is provision to file an appeal, it cannot be said that such person is in the same condition as an accused before the trial Court. In view of such fact, if the appellate Court deems it fit to impose certain conditions so as to ultimately decide the appeal at the earliest by reducing the imprisonment against payment of more fine which may be utilised for payment to the victim as compensation so as to redress his grievance which may result into physical freedom in favour of the accused i.e., not to undergo imprisonment, it cannot be said that the Court has no jurisdiction to do so. Constitutional and statutory right to file appeal does not confirm absolute right to be released on bail, which is quite a discretionary in nature and there cannot be any straight jacket formula or rule of thumb that all accused of all convictions should be released on bail as and when appeal is filed, irrespective of different consideration in different type of cases so also nature and character of the convict. As hardcore criminals or convicts of heinous crimes are not released on bail, even a convict under NI Act may be required to be released on bail or there may be strict conditions for bail considering modus operandi and attitude to take disadvantage of any situation.

14. In addition to above position of law, if we peruse the judgment under reference in detail, it becomes clear that even in such reported case, after discussing several judgments, which are now not required to be discussed herein as suggested by the petitioner, practically the Hon"ble Supreme Court has also concluded and ordered the accused before it to deposit a sum of Rs. 1 lac within a period of four weeks from the date of such order and the Hon"ble Supreme Court has gone to the extent of even allowing to withdraw such amount by the respondent-complainant. Whereas factually, in such reported case, the trial Court has imposed fine of Rs. 25,000/- only on the company, but Chairman of the company was directed to pay compensation of Rs. 15 lacs in addition to imposition of SI for one month. While in appeal against such order, the appellate Court suspended the sentence subject to deposit of Rs. 5 lacs while admitting the appeal of the accused-Chairman. However, ultimately the Hon"ble Supreme Court has held that while suspending the sentence even the appellate Court is entitled to put appellant on terms and also observed that no such term could be put as a condition precedent for entertaining an appeal which is a constitutional and statutory right. Therefore, what is held by the Hon"ble Supreme Court is regarding the rights of the accused to file an appeal, but not with regard to

releasing him on bail in such appeal. The verdict of the Hon''ble Supreme Court needs to be recollected in its own words, which read thus :

"Thus while exercising the appellate power, ordinarily a person should not suffer imprisonment only because the conditions imposed for suspending the sentence are harsh."

15. Therefore, practically what is decided by the Hon''ble Supreme Court in this reported judgment is to the above effect only and discussion of other judgments on other issues is practically to arrive at such conclusion only and, therefore, those discussions cannot be treated and considered as ratio decidendi or determination by the Hon''ble Supreme Court so as to rely upon it while deciding any such issue.

16. The petitioner is also relying upon a decision rendered by the Ld. Single Judge of this High Court in Special Criminal Application No. 3989/2014 between Dhruvaben Bhaveshkumar Mehta v. Mahindra and Mahindra Financial Services Ltd., wherein mainly relying upon the decision of Dilip S. Dahanukar [supra], it was held in following terms :

"In view of the aforesaid provisions, it is clear that the appellate Court is having power to suspend the sentence pending the appeal, and thereby to release the convict person on bail. However, while releasing convict person on bail, a condition which is harsh cannot be imposed." Therefore, though the Ld. Single Judge has quashed and set aside the condition to deposit 25% of the cheque amount in such case, the verdict of the Court does not confirm that there cannot be any such condition when it is specifically decided that while releasing the convict person on bail, a harsh condition cannot be imposed. Therefore, only because of two judgments which practically confirm that there can be condition, but it should not be harsh, it becomes clear that the petitioner has misconstrued both such judgments in his favour.

17. Before coming to the factual details and to consider that whether condition imposed in the present case is harsh or not and in that case, how to make it liberal i.e. how to make the petitioner comfortable in order to abide by such condition, reference to some other judgments is necessary, which confirms such view.

18. The respondent is relying upon the decision between Bhagwati Developers v. State of Gujarat reported in [2013] 5 GLR 3730, wherein the Ld. Single Judge has considered almost similar situation which is emerging in the present case and held that while suspending the sentence in exercise of powers under section 389 of the Code, the appellate Court can impose such condition, more particularly, when the accused has been convicted under section 138 of the NI Act. Under the circumstances, it is held that no illegality has been committed by the appellate Court while passing the impugned order directing to deposit 25% of the cheque amount, while suspending the sentence imposed by the trial Court in exercise of powers under section 389 of the Code. Therefore, it cannot be said

that the appellate Court cannot impose appropriate conditions while releasing the accused on bail. For arriving at such conclusion, the Ld. Single Judge has relied upon judgment rendered in the case of Sanjay Chandra v. CBI reported in [2012] 1 SCC 40, wherein also the Hon"ble Supreme Court has imposed a condition of depositing 25% of the cheque amount while releasing the applicant on bail. Therefore, when the offence involved in the case is with reference to some amount either by cheating or by scam or under section 138 of the NI Act, generally it would be necessary and appropriate to impose a condition upon the accused to deposit, if not full amount, then substantial amount or at-least some reasonable amount to show his bona fide, with the filing of appeal or revision though it is by way of right, so as to confirm that it is not preferred only with a view to delay the process whereby other-side has to suffer a loss.

19. It cannot be ignored that the provision of section 138 of the NI Act is practically for speedy trial of a dispute between the parties where practically there is no defence available with the person who has misused the negotiable instrument.

20. It is quite obvious that the mercantile community makes frequent use of negotiable instruments which are the backbone of the entire commercial world. The issuance of negotiable instrument carries with it certain underlying presumptions and expectations that the same would be honoured on its due date. Therefore, if transactions and litigation based upon such NI Act are not completed in time, then entire financial circle gets upset. The provisions of Chapter XVIII in Part 3 of the NI Act are practically added with such purpose to see that there may not be misuse of negotiable instrument and further to see that litigation based upon negotiable instrument, more particularly cheque, which is nothing but promise to pay the amount, cannot be dragged into the Civil Court for years together.

21. In addition to such position, if we peruse the decision of the Delhi High Court in the case of Om Prakash Bajaj v. Som Dutt Bajaj dated 2/2/2009 in Criminal Misc. Case No. 2245/2008, it becomes clear that the Delhi High Court has even after considering the decision of the Hon"ble Supreme Court in the case of Dilip S. Dahanukar [supra] observed and held as under:

"14. The said order of the Trial Court was challenged before the Appellate Court and while admitting the appeal, the Appellate Court gave directions to the appellant company to deposit a sum of Rs. 5 lacs each in place of compensation of Rs. 15 lacs awarded by the learned Trial Court. The writ petition was filed by the company questioning the liability of the order of the Appellate Authority, but without any success where after the matter came before the Apex Court for consideration. It would be thus noticed in the facts before the Apex Court clear directions were given in the order of sentence to pay a compensation under Section 357(3) Cr.P.C., while in the facts of the present case compensation has been directed by the Trial Court based on the amount of dishonoured cheque of Rs. 4 lakhs, fine of which could be imposed by the Trial Court to twice the

amount of the cheque, but in place of the double of the amount directions were given for the payment of an amount of Rs. 7 lakhs to the appellant. This order under no circumstances can be considered to have been passed by the Trial Court under Section 357(3) Cr.P.C. but same in fact has been passed deriving the mandate from Section 138 of the Negotiable Instruments Act. Even in the absence of Dilip S. Dahanukar (Supra) case where Trial Court gave directions for the payment of compensation amount, the Apex Court has not placed any fetters on the power of the Appellate Court but merely put the appellant to reasonable terms while suspending his sentence. Relevant para 73 of the said judgment in this regard is referred as under:-

"73. 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."

15. Based on the said conclusions the Apex Court found it reasonable to give directions to the appellant in the said case to deposit a sum of Rs. 1 lakh in place of Rs. 15 lakhs directed by the Trial Court and Rs. 5 lakh directed by the Appellate Court. It would be thus manifest that the appellate Court although cannot impose any term as a condition precedent for entertaining an appeal against the order of the conviction, the same being a constitutional and statutory right, but at the time of passing an order for suspension of sentence under Section 389 Cr. P.C. the appellant approaching the Court seeking suspension of his sentence can be put to reasonable terms depending upon the facts of a given case.

16. In view of the foregoing, the judgment of the Apex Court entitled Dalip S. Dahanukar (Supra) does not apply to facts of the case. It is no more *res integra* that the observations of the courts cannot be read as Euclid's Theorem and that too taken out of its context. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. In this regard, the Hon'ble Apex Court in *Union of India v. Amrit Lal Manchanda*, (2004) 3 SCC 75 observed as under:-

"15. Cases involving challenges to orders of detention before and after execution of the order stand on different footings. Courts should not place reliance on

decisions without discussing as to how factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton*, AC at p. 761 Lord Macdermott observed: (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge...."

16. In *Home Office v. Dorset Yacht Co.*, 1970 (2) All ER 294 Lord Reid said (at All ER p. 297g-h), "Lord Atkin's speech ... is not to be treated as if it were a statutory definition. It will require qualification in new circumstances." Megarry, J., in (1971) 1 WLR 1062 observed:

"One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament."

And, in *Herrington v. British Railways Board*, 1972 (1) All ER 749 Lord Morris said: (All ER p. 761c)

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

17. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Therefore, the ratio decidendi as per above referred judgments is to the effect that it is reasonable to impose condition at the time of passing order for suspension of sentence, whereas pursuant to the observations made in the case of *Dilip S. Dahanukar* [supra] at the most Court has to see that such condition should not be so harsh that the petitioner may not be released on bail at all for non-compliance of such condition. But except that, it cannot be said that no condition whatsoever can be imposed and that imposition of condition is not illegal.

22. The decisions of the Bombay High Court in the cases of [1] *Mohmad Hafiz Khan v. Anand Finance* rendered in Criminal Revision Application No. 119 of 2003, dated 23/7/2003 and *Ajay v. Laxmikant Trading Co. Pvt. Ltd.*, in Cri. Writ

Petition No. 625/2015, dated 21/9/2015 would be relevant to be recollected here wherein the Bombay High Court has while confirming the imposition of condition at the time of granting bail, taken a stand to give reasonable relief to the petitioner-accused to deposit the amount i.e. by way of instalments so as to avoid allegation that such condition is harsh.

23. In addition to above issues on law point, wherein now as per the above discussion, when there is no substance in such submission by the petitioner, if we peruse the factual details, though minute discussion and determination on factual details may not be warranted at this stage so as to avoid prejudice on pending appeals, at least basic information needs to be recollected here. It is admitted position that present petitioner has obtained possession of property occupied by the complainant against some MoU and commitments and when such MoU and commitments could not be fulfilled by him, the petitioner has agreed to pay an amount of Rs. 1,77,00,000/- to the complainant and issued different cheques for such payment. It is also undisputed fact that out of total cheques issued by the petitioner, six cheques were honoured by the bank of the petitioner and thereby petitioner has paid Rs. 77,00,000/-, but thereafter petitioner has to pay remaining amount of Rs. 1 crore for which the petitioner has exchanged the previous cheques with the cheques which are subject matter of present litigations. Therefore, when such remaining cheques were not honoured by the petitioner's banker, the complainant has initiated such proceedings. Thereby, prima-facie it becomes clear that probably there is no defence available with the petitioner when there is commitment to make certain payment in writing and when the petitioner has issued several cheques to fulfil such commitments and when out of said cheques, few cheques were already honoured. Therefore, what is to be seen by the appellate Court at the time of admitting the appeals and releasing the accused on bail, is quite obvious that whether filing of appeals is genuine or only with a view to prolong the time and thereby to delay the execution of order of conviction. Therefore, in such cases, if appellate Court deems it fit to impose condition to deposit certain amount, it cannot be said that such condition is illegal.

24. So far as harshness of such condition is concerned, it is always subjective, but inasmuch as, as already discussed earlier, it would depend upon the amount of cheques in question and, therefore, it cannot be said that a direction to deposit Rs. 30 lacs in all i.e. aggregate for all four appeals, is harsh because disputed amount of cheques is Rs. 1 crore. Therefore, practically even the impugned order cannot be considered as a harsh order so as to enable the petitioner to be released on bail because even after depositing 30% amount of the cheques, he is enjoying benefit of 70% of the amount of the cheques or amount in dispute. However, at the most the petitioner may be entitled to some instalments for making such payment so as to make him convenient to deposit such amount.

25. The Appellate Court has given direction for suspension of sentence as

awarded by the Trial Court, subject to the appellant depositing a sum of equal to 30% of the amount of cheque being Rs. 7,50,000/- in each appeal and released on bail on executing a personal bond of Rs. 20,000/- by the petitioner and with certain other conditions. However, said condition has been imposed not for entertaining an appeal, but for the suspension of sentence as was being sought by the appellant. Admittedly, the complaints were based on a dishonoured cheques for a sum of Rs. 100 lacs and, therefore, to secure the rights of the complainant, the Appellate Court had initially proposed to impose a compensation/fine of Rs. 30 lacs upon the petitioner and, therefore, directed to deposit the same without an order to pay/disburse in favour of the complainant. The Appellate Court was fully conscious of the amount of the cheques involved in the case.

26. In the light of the above discussion, I do not find any infirmity or irregularity or illegality in the impugned order passed by the Appellate Court giving direction to the petitioner to deposit a sum of Rs. 7,50,000/- in each case total being Rs. 30 lacs and other directions given by the Appellate Court for suspension of sentence of the petitioner, which are well within his powers under section 389 of the Code.

27. In view of above facts and circumstances, when there is no irregularity or illegality in the impugned order, I do not see any substance in revision applications and, therefore, the same need to be dismissed, but with extending some liberty to the petitioner to pay the amount in instalments.

28. In the result, the revision applications are dismissed. Rule is discharged. Interim relief is vacated. However, the petitioner is permitted to deposit the amount as per impugned order in six monthly equal instalments. As and when such amount is deposited, it is to be invested in FDR, which shall be subject to outcome of the litigation between the parties and it would be appropriate for the trial Court to expedite the hearing of the appeals and to decide the same preferably within six months.