

(2004) 03 BOM CK 0036

In the Bombay High Court

Case No : Criminal Rev. Application No. 376 of 2003

Suresh Fulchand Bumb

APPELLANT

Vs

Shantikumar K. Damani

RESPONDENT

Date of Decision : 10-03-2004

Acts Referred:

Negotiable Instruments Laws (Amendment) Act, 1988 — Section 138

Citation : (2004) 3 BC 246 : (2004) 2 MhLj 753

Hon'ble Judges : Naresh H. Patil, J

Bench : Single Bench

Advocate : B.R. Warma, for the Appellant; G.V. Wani, for the Respondent

Judgement

Naresh H. Patil, J.—Heard.

2. Rule. Rule made returnable forthwith by consent of the parties.

3. The petitioner herein is a original complainant who filed a complaint u/s 138 of the Negotiable Instruments Act, 1881, on 21-5-1997. The case of the complainant is that he and accused both were running a business as share brokers. The complainant had a terminal of the National Stock Exchange. The respondent approached the complainant for some transaction to be done with the help of the terminal. The parties agreed for the said transaction and in furtherance of the same, the respondent was to pay an amount of Rs. 35,191/- to the petitioner. Out of the said amount, an amount of Rs. 12,034/- was paid by cheque No. 230143 dated 10-4-1997. The cheque was deposited in the Bank. The same was dishonoured for want of sufficient funds. On the request of the accused, the cheque was deposited again on 12-4-1997 which was again dishonoured for insufficient funds in the account of the accused. In spite of repeated requests, the amount was not paid by the accused and, therefore, on 24-4-1997, the petitioner, by issuing a notice, called upon the respondent to pay the amount, The respondent failed to comply as per the notice and therefore, the complaint was filed.

4. The trial Court issued process u/s 138 of the said Act. The respondent appeared in the matter, charge was framed against him and evidence was led in furtherance of the charge. The complainant examined himself and two other witnesses and closed his evidence. The original accused did not examine himself nor any other witness on his behalf.

5. The trial Court by the judgment and order dated 30-9-2002, convicted and sentenced the respondent to pay a fine of Rs, 5000/- only.

6. The learned Counsel Shri Warma, appearing for the petitioner submits that after going through the evidence on record, the trial Court was convinced and therefore, the order of conviction was recorded against the respondent. But, while awarding sentence, a meager sentence of fine was directed to be imposed on the respondent. Taking into consideration the facts of the case and the evidence led by the petitioner, the sentence was grossly inadequate as imposed by the trial Court and is not in keeping with the principles enunciated by the Apex Court in a reported judgment in the case of Suganthi Suresh Kumar Vs. Jagdeeshan, .

7. He further submitted that it would have been appropriate for the trial Court to even award amount of compensation to the petitioner but the same was not done.

8. The learned Counsel Shri Wani, appearing for the respondent submits that the amount involved in the case is not hefty one. The principles evolved by the Supreme Court in the case of Suganthi (supra), are not applicable to the facts of the present case and taking into consideration the evidence on record, the trial Court adopted a correct approach in awarding the sentence of fine only instead of -awarding punishment of imprisonment.

9. The Apex Court, in the case of Suganthi (supra) has observed,--"No drawer of the cheque can be allowed to take dishonour of the cheque issued by him lightheartedly. The very object of enactment of provisions like 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is different matter if the accused paid the amount at least during the pendency of the case."

It was further observed,--

"If the amounts had been paid to the complainant there perhaps would have been justification for imposing a flee-bite sentence as had been chosen by the trial Court."

10. In the Suganthi's case (supra), the trial Magistrate, after holding the respondent guilty of the offence, convicted him of the aforesaid offence but, sentenced to undergo imprisonment till rising of the court and pay a fine of Rs. 5000/-.

11. The reasoning adopted by the Judicial Magistrate, First Class (IInd Court),

Jalgaon for awarding the sentence finds place in the paragraph 28 of the judgment wherein it is observed that the accused prayed for a lenient view and the lesser sentence and taking into consideration the amount involved, the view was adopted that sentence of fine would meet the ends of justice.

12. The respondent failed to satisfy this Court that during pendency of the case, he had shown desire to pay the amount of cheque to the petitioner. He permitted the trial to go ahead till its conclusion and suffer a conviction and sentence. Even, after suffering the order of conviction and sentence, there is nothing on record to show that he had offered to pay the amount to the petitioner.

13. The grievance of the learned Counsel for the petitioner is that this is a fit case wherein there could have been substantial sentence and also an order awarding compensation to the petitioner. There is substance in the said argument.

14. For the offence punishable u/s 138 of the said Act, law provides punishment with imprisonment for a term which may be extended to two years or with fine which may extend to twice the amount of the cheque, or with both.

15. Keeping in view the principle evolved by the Apex Court in the case of Suganthi (supra), the facts of the present case, the impugned judgment and order passed by the J.M.F.C., it would be appropriate to remand the case back to the trial Court.

16. In the result, the order of sentence awarded by the J.M.F.C. (IInd Court), Jalgaon in Summary Case No. 384/1997 dated 30-9-2003, is set aside. The matter is remanded to the trial Magistrate who shall hear both the sides once again on the point of sentence and pass a well deserved sentence, within a period of four weeks from receipt of the writ from this Court.

The learned Counsel Shri Wani, appearing for the respondent, at this stage, submits that if the respondent is able to make payment of the amount covered by the cheque, he shall not be debarred for taking out the plea for mitigation of the sentence. The respondent will be entitled to make such a plea, in the event of his succeeding in paying the amount covered by the cheque.

Rule made absolute in the above terms.