

(2009) 03 BOM CK 0024

In the Bombay High Court

Case No : Criminal Writ Petition No. 92 of 2009

Vandana Nursinh Kelkar

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1)
Negotiable Instruments Act, 1881 (NI) — Section 138A

Citation : AIR 2011 Bom 304 : (2010) 2 BC 359 : (2011) 6 RCR(Criminal) 2053

Hon'ble Judges : Bilal Nazki, J;A.R. Joshi, J

Bench : Division Bench

Advocate : R.G. Panchal, for the Appellant; Shirish Gupte, Vikas Shivarkar, for the Respondent

Judgement

Bilal Nazki, J.—This Petition was filed challenging the action of the learned Sessions Judge and the Magistrate which has resulted in imprisonment of the petitioner. Petitioner was sentenced to six month imprisonment and also fine of Rs. 1,75,000/-. Out of this amount Rs. 1,73,000/- were to be paid as compensation to the complainant. The Complaint was u/s 138A of Negotiable Instruments Act.

2. It appears that when the petitioner was sentenced, she filed an application for suspension of sentence.

3. The learned Magistrate passed an order on the back of the application in the following words:

Accused has not paid the fine amount. Hence, substantive sentence could not be suspended. Hence, the application is rejected.

Therefore, the petitioner moved the learned District Judge-3 and Additional Sessions Judge, Kalyan, but he did not pass any order and according to the petitioner, verbally, told the petitioner that he was in charge of four Courts so he could not pass any order. Thereafter, this Court passed an order on 17th January,

2009 and ordered release of the petitioner on bail and sought explanation from the learned Judges. After the explanations were received, by another order we requested Mr. Gupte, learned Counsel, to assist in the matter as amicus curiae.

4. Before we go to the provisions of law which need to be discussed, it will be profitable to have a glimpse on the explanation. The explanation of Additional Sessions Judge is that he relied on various judgments of the Apex Court which held that it was advisable that the Court imposes conditions that the amount of fine be remitted in Court before bail is granted. He stated that this Court should have immediately passed an order of releasing the accused on bail by passing additional order of payment of the part of the amount. However, the Counsel for the appellant/petitioner wanted to be heard in the matter. He gave time to address the Court when the matter reached for hearing at about 6.00 p.m. The Advocate was heard for almost 15 minutes and in spite of asking him to be brief he had done nothing except delivering philosophical speech. Hence hearing could not be concluded. The matter was adjourned to 20th January, 2009. The appeal has been filed on 30th January, 2009 which meant that for seven days the petitioner had to remain in custody before the learned Sessions Judge could hear the Counsel.

5. The learned Sessions Judge who was in charge of various Courts, thereafter, could not look into the grievance of the petitioner. But, it is crystal clear that the learned Sessions Judge did not pass any order on the application of bail moved by the petitioner along with her appeal. Explanation of the Magistrate is that, he was of the view that Section 389 of Criminal Procedure Code would not authorize him to suspend the sentence, if the sentence was of imprisonment and also of fine. The sentence can only be suspended if the fine was paid. He stated that he announced the judgment at 12.30 p.m. At that time, the accused was present in the Court, the Judgment was explained to the accused. The accused was directed to arrange for fine amount, if she wanted suspension of sentence. But, till 5.30 p.m. she failed to deposit the fine amount and, therefore, the order was passed which is already quoted above. It is not expected from any person to arrange an amount of Rs. 1,73,000/- immediately after judgment was pronounced. Section 389 of Criminal Procedure Code read thus:

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall--

(i) where such convicted person, being on bail, is sentenced to imprisonment for

a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under Sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

Various judgments have been cited before us, the latest being in case of Dilip S. Dahanukar Vs. Kotak Mahindra Co. Ltd. and Another, . After considering the law laid down by various judgments including the judgment referred to above, we are of the view that once a person is convicted and sentenced Section 389 would be applicable, the Judge has to pass an order of bail mandatorily, but this order in case of fine could be subject to conditions. Therefore, the proper course in this case would have been the Magistrate passing the order for bail subject to payment of fine in full or in part as he would deem fit in the circumstances of the case by giving reasons. If the Magistrate failed to do so when the bail application had been filed before him, he should follow the law.

6. The learned Judge did not pass any order granting bail subject to payment of fine. As a result, the petitioner had to undergo imprisonment for more than a week. In these circumstances, considering the law and import of Section 389 of the Criminal Procedure Code, we hold that the person if sentenced to imprisonment which is covered u/s 389 of the Criminal Procedure Code, the Magistrate should offer bail and if the sentence is coupled with fine or compensation the Magistrate may offer bail by imposing appropriate conditions as he deems fit in the facts and circumstances of the case regarding payment of fine in full or in part. In this case, we have already bailed out the petitioner. She would continue to remain on bail till her appeal is disposed of. But, she shall deposit the amount of Rs. 50,000/- within four weeks from today and shall give a personal bond. If the amount is not deposited as directed the appellate Court may pass appropriate orders. After the amounts are deposited in terms of this order, the appellate Court may decide as to whether the amount shall remain in Court or be handed over to the respondent.

7. Before parting, we would like to record the valuable assistance given by the Senior Counsel Mr. Shirish Gupte (*amicus curiae*).