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(2019) 07 P&H CK 0122

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous Petition (M) No. 29187, 29188 Of 2019 (O&M)

Vivek Sahni And Another — APPELLANT

Vs

Kotak Mahindra Bank Ltd. — RESPONDENT

Date of Decision : 18-07-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 143A, 143(5), 148, 148(2)
Code Of Criminal Procedure, 1973 — Section 125, 357, 357(5), 421, 421(1)
Negotiable Instruments (Amendment) Act, 2018 — Section 148, 148(2)

Citation : (2019) 07 P&H CK 0122

Hon'ble Judges : Anil Kshetarpal, J

Bench : Single Bench

Advocate : Nitin Jain, D.K.Singal

Judgement

Anil Kshetarpal, J

Courts are required to rediscover itself when they face unprecedented challenges particularly in absence of clear statutory mandate. These cases also

throw such challenge. Let me take an attempt to do justice.

By this order, CRM-M-29187 and CRM-M-29188 of 2019 shall stand disposed of. Counsel for the parties are also agreed that the issues involved for

decision are common in both the petitions.

Following questions needs determination:-

(1) â??Whether a convict under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the NI Act') while in appeal against the

conviction is entitled to pray for adjustment of the amount already recovered under the Securitisation and Reconstruction of Financial Assets and

Enforcement of Securities Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') towards directions of the appellate court to deposit certain percentage of the compensation or fine under Section 148 of the NI Act or not particularly when it is not disputed that amount involved

proceedings under the SARFAESI Act and the NI Act 1881 are arising out of same transaction?

(2) Whether on non-deposit of the amount as directed under Section 148 of the Negotiable Instrument Act, 1881, bail granted to the appellant is liable

to be automatically/consequently cancelled? Some facts are required to be noticed.

Petitioners herein (2 in number, one individual and second incorporate company) had allegedly taken two credit facilities from Capital First Limited.

Since, it is alleged that petitioners did not adhere to the financial discipline, defaulted in re-payment of monthly installments, therefore, petitioners issued

cheques in favour of M/s Capital First Limited towards re-payment of the entire credit facility. Cheques were dishonored by the bank when presented

for encashment resulting in filing of two complaints under Section 138 of the NI Act. Subsequently, Kotak Mahindra Bank was substituted being

assignee. Along with the proceedings under Section 138 of the NI Act proceedings under the SARFAESI Act were also initiated.

Learned Judaical Magistrate convicted the petitioners of offence under Section 138 of the NI Act and sentenced to imprisonment for a period of two

years in 2 separate cases and they were also directed to pay compensation equivalent to the cheque amount to the complainant.

In the proceedings under SARFAESI Act, it is undisputed that in the meanwhile two mortgaged properties have been sold through different auctions

and respondent bank has already recovered Rs.1.73 crores.

Aggrieved by the conviction and sentence in proceedings under section 138 of the NI Act, 2 separate appeals were filed, concession of bail was

granted by the first appellate Court. Simultaneously, petitioners-convicts were directed to deposit 20% of the compensation amount under Section

148(2) of the NI Act as introduced by amendment Act of 2018.

Petitioners filed applications in both the cases for adjustment of the amount directed to be paid by the appellate Court as interim compensation, noticed

above, against the amount recovered under SARFAESI Act which have been dismissed by the Court by passing separate similarly worded orders on

the ground that the appellants have failed to point out any provision of law permitting such adjustment/arrangement. It may be noted here that while

granting bail vide order dated 02.04.2019, petitioners-convicts were directed to deposit 20% of the compensation awarded by the trial court which in

both the appeals comes to Rs.60,00,000/-. It is undisputed that after 02.04.2019 when petitioners were directed to deposit 20% of the amount of

compensation, respondent-bank has recovered Rs.1,21,00,000/- by sale of showroom on 16.04.2019 besides Rs.52,00,000/- recovered earlier thereto.

This Court has heard learned counsels for the parties at length and with their able assistance gone through the paper books.

In the considered view of this court, learned first appellate court has erred in addressing the issue raised by the petitioners from a wrong direction. It is

fundamental rule of law that if more than one proceedings are pending for recovery of the same or connected or interlinked amount, the court would

normally adjust the amount which has been paid/recovered in one proceeding. For example, in the cases of grant of maintenance under different

statutes, like proceedings under Section 125 Cr.P.C., Protection of Women from Domestic Violence Act, Hindu Marriage Act, payment in one

proceeding is accounted for in another proceeding unless there is order to the contrary. Still further it is also well settled that no one can be called upon

to pay more than what is due, even, if under different proceedings judgments and decrees or orders have been passed. Here is a case where parallel

proceedings have been initiated under SARFAESI Act and the NI Act. Of course, proceedings under NI Act is not for recovery but provision for

payment of interim compensation has been made to achieve recovery of some part of the amount. Appellate Court in the proceedings under NI Act

has ordered deposit of 20% of the compensation amount in both the appeals, the sum total whereof, comes to Rs.60,00,000/-, whereas respondent

admittedly has recovered much more amount while selling mortgaged property belonging to the petitioners even after direction was issued by the

appellate court.

Now let's make an attempt to answer the questions framed in the beginning.

Q.NO.1:

â??Whether a convict under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the NI Act')while in appeal against the

conviction is entitled to pray for adjustment of the amount already recovered under the Securitisation and Reconstruction of Financial Assets and

Enforcement of Securities Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') towards directions of the appellate court to deposit

certain percentage of the compensation or fine under Section 148 of the NI Act or not particularly when it is not disputed that amount involved

proceedings under the SARFAESI Act and the NI Act 1881 are arising out of same transaction?

Negotiable Instrument Act, 1881 has been amended in 2018.

Two significant provisions have been added, i.e., Section 143A and Section 148 which are extracted as under:-

â??â??143A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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 cause 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.

(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, shall be reduced by the amount paid or recovered as interim compensation under this section.â??â??.

â??â??148. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, 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 143A.

(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.â??â??.

Sections 357 and 421 of the Code of Criminal Procedure, which are relevant, are extracted as under:-

357. Order to pay compensation.

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing

judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court,

recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an

offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the

person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having

dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be

stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person

entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has

elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by

way of compensation, 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.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of

revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or

recovered as compensation under this section.

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) The State Government may make rules regulating the manner In which warrants under clause (a) of sub-section (1) are to be executed, and for

the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such

warrant.

(3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with

the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant

shall be executed by the arrest or detention in prison of the offender.

Section 143A of the NI Act enables the trial courts to award interim compensation in the cases arising out of dishonor of the cheques. It is provided

that 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. Sub-section (5) of Section 143A

of the NI Act provides that interim compensation if not paid as provided in sub-section (3) it may be recovered as if it were a fine under section 421 of

the Code of Criminal Procedure, 1973. However, such procedure delineating the consequence of default of payment of the percentage of fine or

compensation awarded is conspicuously absent in Section 148 of the NI Act. If we carefully examine provision of Section 357 of the Code of Criminal

Procedure, it is apparent that sub-section (3) lays down that when a Court impose sentence, of which fine does not form a part, the Court may, when

passing judgment, order the accused person to pay, by way of compensation, 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.

Another relevant provision is in sub-section (5) of Section 357 of the Code of

Criminal Procedure providing that while awarding compensation in any

subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Section 421Cr.P.C. deals with the procedure for execution of the fine. It provides that the Court can adopt any of the procedure prescribed in Section

421(1) Cr.P.C.. First option with the court is to issue a warrant for the levy of the amount by attachment and sale of any movable property belonging

to the offender. Second option is to 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.

In view of the aforesaid provisions, it is clear that the interim compensation or compensation ordered by the Court while dealing with criminal case is

liable to be accounted for in any subsequent civil suit or proceedings. Even otherwise, this court did not find that there is any prohibition or impediment

in ordering adjustment.

Let's try to examine this question from another angle. The intention of the legislature is to introduce provision for speedy recovery of some part of the

amount representing the cheque amount as an interim measure. It is not the intention of the legislature that if some part of the cheque amount has

already been recovered in a separate proceedings, may be civil proceedings, the amount ordered to be deposited as interim compensation or fine shall

still liable to be deposited in the appeal or the trial Court.

Let's evaluate the situation from another angle. As per proviso to sub-section (3) of Section 148 of the NI Act, it is provided that after deposit of the

compensation, 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. However, in any other situation there is no provision for refund. Hypothetically, there can be situation when in the civil proceedings, entire

amount has already been recovered and then if the convict-appellant is forced to pay the additional amount as ordered by the Court under Section 148

of the NI Act, apart from being inequitable, there is no remedy in the Act to recover the amount deposited because the amount of interim

compensation can be directed to be paid to the holder of the cheque.

Another aspect of the matter is that the intention of the legislature is to ensure that at least certain percentage of the defaulted cheque amount or compensation ordered is recovered as an interim measure because decision in the trial of such cases and appeal take lot of time. However, the

intention of legislature cannot be that the interim compensation is bonanza to the complainant.

Learned counsel for the petitioners has made reference to a judgment passed by the Hon'ble Supreme Court in the case of D.Purshotama Reddy and

another vs. K. Sateesh, (2008) 8 SCC 505. In that case, Hon'ble Supreme Court was examining a situation where in the proceedings under Section

138 of the NI Act compensation amount ordered by the court stood paid. For recovery of some amount including the cheque amount, a civil suit had

been filed which was decreed along with interest. Question which arose before the Hon'ble Supreme Court was whether such amount is liable to be

adjusted. The Court found that the provisions of the Act have to be given purposive interpretation and construction, therefore, the amount of

compensation already recovered shall be liable to be adjusted in the decree of the Civil court as per the provisions of sub-section (5) of Section 357 of

the Code of Criminal Procedure.

Taking support from the aforesaid judgment, this Court is of the view that the facts of each case particularly when the amount under cheque and

recovery proceedings under any other provision is same and interconnected, the Courts are well within their power to order adjustment.

Accordingly Question No.1 is answered in favour of the petitioners.

Q.No.2

Whether on non-deposit of the amount as directed under Section 148 of the Negotiable Instrument Act, 1881, bail granted to the appellant is liable to

be automatically/consequently liable to be cancelled?

On careful examination of Sections 143A and Section 148 of the NI Act, it is nowhere, specifically provided that if the payment as ordered has not

been deposited, the bail granted shall be liable to be consequently cancelled. Section 143 do provide that recovery can be made of such defaulted

amount as if it is a fine under Section 421 Cr.P.C., therefore, obviously during the trial of the case, the Court should not cancel the bail already granted

on this ground alone. The offence under Section 138 of the NI Act is bailable. Still further, although, there is no provision in Section 148 of the NI Act

for recovery of defaulted amount against appellant, however, the words used are â??fine or compensationâ? awarded by the trial Court. Default in

payment of certain percentage of compensation or fine, would not ipso facto result in cancellation of the bail. There are long series of judgments

passed by the Hon'ble Supreme Court that normally conditions for grant of bail cannot be made onerous for the accused. Once the legislature or

framers of the NI Act have not made any specific provision for automatic cancellation of the bail granted by the trial court or the appellate court on

account of default of payment of interim compensation or certain percentage of compensation or fine, it would not be appropriate to hold it otherwise.

Accordingly, Q. No.2 is also answered in favour of the petitioners.

For the reasons recorded, the order under challenge is set aside, the amount recovered under the SARFAESI Act shall be deemed to have been

adjusted towards 20% of the compensation as ordered by the Court. The Appellate Court would proceed to decide the appeal in accordance with law.