HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CRM(M) 21/2020
CrlM No. 33/2020
c/w
CRM(M) No. 22/2020

Reserved on 15.11.2021
Pronounced on 22 .11.2021

Yasir Amin Khan ..... Petitioner (s)

Through :- Mr. F.A.Wani, Advocate

V/s

Abdul Rashid Ganie .....Respondent(s)

Through :- None

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

CRM(M) No. 22/2020

1 By this petition filed under Section 482 Cr.P.C, the petitioner seeks setting aside of order dated 24.01.2020 passed by the Special Mobile Magistrate (Sub-Judge), Srinagar (hereafter referred to as the 'trial Court') in a complaint bearing No. 29/2019 titled "Yasir Amin Khan vs. Abdul Rashid Ganie filed under Section 138 of Negotiable Instruments Act, 1981 ['N.I Act'] whereby on the basis of statement made by the respondent-accused under Section 242 Cr.P.C (251 Central Act), he has been convicted and punished with simple imprisonment for a term of six months and in addition, he has been held liable to pay compensation of Rs.2.00 lac to the petitioner.

2 The petitioner is not aggrieved by the impugned order insofar as it convicts respondent-accused for commission of offence under Section 138 of N.I.Act and imposes punishment of simple imprisonment for a term of six

months. However, his grievance is that the respondent-accused should have also been awarded fine sufficient enough to meet the liability of the cheque issued by him which later on was dishonoured. It is, thus, submitted that payment of compensation of Rs.2.00 lac, to be paid to the petitioner in terms of the impugned order, is only one fifth (1/5th) of the value of the cheque. It is contended by learned counsel for the petitioner that the complaint filed by the petitioner under Section 138 read with Section 142 of N.I. Act was in respect of cheque issued by the respondent-accused for an amount of Rs.10.00 lac, which, on presentation in the Bank, was returned for want of sufficient funds in the account of the respondent. It is, thus, submitted that once the respondent appeared before the trial Court and admitted the liability, the trial Court should have exercised its discretion to impose minimum fine of Rs.30.00 lac and ordered payment of same to the petitioner by way of compensation.

3 In response to the notice issued, the respondent has entered appearance through Mr. Syed Ansar Advocate, but has chosen not to appear when the case was taken up for consideration. The respondent, however, is not aggrieved of the impugned order and has not assailed the same by filing any appeal.

4 Having heard learned counsel for the petitioner and perused the record, the only question that begs determination in this case is what should be the approach of the trial Court while awarding punishment to an accused convicted for commission of offence under Section 138 of N.I. Act; whether the trial Court should, with or without the punishment of imprisonment, impose fine which is sufficient enough to meet the liability of the accused towards the complainant as represented by the bounced cheque ?.

5 With a view to appreciate the issue raised by learned counsel for the petitioner, it is necessary to first set out Section 138 of N.I. Act.

> ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account.*** *—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished 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:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and,*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
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> *Explanation- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability".*

6 As is apparent from a bare reading of Section 138 of N. I. Act reproduced above, the Criminal Court after convicting the accused, is empowered to impose punishment of imprisonment for a term, which may

extend to two years, or fine which may extend to twice the amount of cheque, or both. The trial Court is, thus, given the discretion to impose the sentence of imprisonment or fine or both.

7 At this stage, it would be appropriate to recall the observations of Hon'ble Supreme Court made in the case of **Assistant Commissioner, Assessment-II and ors vs. M/S Velliappa Textiles Ltd., and another, 2003 11 SCC 406,** which read thus:

> *"35. ……. Where the legislature has granted discretion to the court in the matter of sentencing, it is open to the court to use its discretion. Where, however, the legislature, for reasons of policy, has done away with this discretion, it is not open to the court to impose only a part of the sentence prescribed by the legislature, for that would amount re-writing the provisions of the statute."*

8 In Section 138 of N.I. Act, the word "or" has been employed which would mean discretion has been conferred in the matter of sentencing the person convicted for offence under Section 138 of N.I. Act. However, while exercising this discretion, the trial Court must be alive to the object of the enactment i.e., N.I. Act, particularly the object of engrafting Section 138 in the said Act. The prime object of enacting Chapter XVII, which was inserted in the N.I. Act by Act 66 of 1988 w.e.f 01.04.1989, is to control and discourage the menace of cheque bouncing in the course of commercial transactions and to encourage the culture of use of cheques and enhancing the credibility of the instrument. This was very aptly noticed by the Hon'ble Supreme Court in the case of **Damoder S. Prabhu vs Sayed Babalal H. (2010) 5 SCC 663**. Paragraphs (3) and (4) of the judgment are noteworthy in this regard and are, thus, reproduced hereunder:

"3. However, there are some larger issues which can be appropriately addressed in the context of the present case. It may be recalled that Chapter XVII comprising Sections 138 to 142 was inserted into the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988). The object of bringing Section 138 into the statute was to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. It was to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficient arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers. If the cheque is dishonoured for insufficiency of funds in the drawer's account or if it exceeds the amount arranged to be paid from that account, the drawer is to be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both".

"4 It may be noted that when the offence was inserted in the statute in 1988, it carried the provision for imprisonment up to one year, which was revised to two years following the amendment to the Act in 2002. It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a fine which may extend to twice the amount of the cheque serves a compensatory purpose. What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions".

(**underlined** by me)

9 Later in paragraphs (17) and 18 of the said judgment, the Hon'ble Supreme Court, referring to recently published commentary on the topic of Section 138 of N.I. Act, made very apt observations. It was noticed by the Hon'ble Supreme that Unlike other forms of crime, the punishment for commission of offence under Section 138 of N. I. Act is not a means of seeking retribution, but is more a means to ensure payment of money and, therefore, in

respect of offence of dishonor of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. For ready reference, the observations of the Hon'ble Supreme Court in paragraphs (17) and (18) are reproduced:

> *"17. In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act. Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque. If we were to examine the number of complaints filed which were `compromised' or `settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."*
>
> *18 It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. There is also some support for the apprehensions raised by the learned Attorney General that a majority of cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages of litigation thereby contributing to undue delay in justice- delivery. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute. Furthermore, the written submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 of the CrPC, Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court"*
>
> **(emphasis** supplied**)**

10 Similarly in the matter of **Somnath Sarkar vs Utpal Basu Mallick and another, (2013) 16 SCC 465,** the Hon'ble Supreme Court while

considering the issue in paragraph (15) has summed up its observations in the following manner:

> 15…….. Suffice it to say that the High Court was competent on a plain reading of Section 138 to impose a sentence of fine only upon the appellant.. Inasmuch as the High Court did so, it committed no jurisdictional error…..”

11 This Court in its judgment rendered in the case of **Abdul Hamid Mir v Tariq Ahmad Khan, (**561-A CrPC No. 124/2015, decided on 20.02.2018) also made the similar observations.

12 From a reading of provisions of Section 138 of N. I. Act in the context of laudable object sought to be achieved by Chapter XVII of N.I Act, it is abundantly clear that the Criminal Court while convicting an accused for commission of offence under Section 138 of N.I. Act, cannot ignore the compensatory aspect of remedy and the compensatory aspect can only be given due regard if the sentence imposed is at least commensurate to the amount of cheque, if not more, so that this fine, once imposed, can be appropriated towards payment of compensation to the complainant by having resort to Section 357 of Cr.P.C. Before we proceed, it would be appropriate to set out the provisions of Section 357 as well.

> ***“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".

13 The law with regard to grant of compensation under Section 357 (3) of Cr.P.C in the cases arising under Section 138 of N.I. Act is now well settled. As observed above, the object of Section 138 of N.I. Act is not only punitive, but is compensatory as well. As the supreme Court says, the compensatory aspect must receive priority over the punitive aspect of Section

138 of N. I. Act. At this stage, I would like to refer to the Judgment of Supreme Court in the case of **Suganthi Suresh Kumar vs Jagdeeshan 2002 2 SCC 420,** in paragraph (12) whereof, it is held thus:

> *"The total amount covered by the cheques involved in the present two cases was Rs. 4,50,000. There is no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial court or revision before the High Court or this Court. 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. But in a case where the amount covered by the cheque remained unpaid it should be the look out of the trial Magistrates that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like Section 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount at least during the pendency of the case".*
>
> **(underlining** mine**)**

14 In a later case of **R. Vijayan vs Baby & Anr, (2012) 1 SCC 260**, their Lordships of Hon'ble Supreme Court culled out the following principle from the provisions of Chapter XVII of N.I. Act which states as under:

> *"The provision for levy of fine which is linked to the cheque amount and may extend to twice the amount of the cheque (section 138) thereby rendering section 357(3) virtually infructuous in so far as cheque dishonour cases are concerned".*

The Hon'ble Supreme Court in the later part of the said judgment while alluding to the intention of the Legislature for enacting Section 138 held thus:

> *"17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under section 357(1)(b) of the Code. Though a complaint under section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount, (which*

strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under section 357 (1)(b) of the Code and the provision for compounding the offences under section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary".

"18. Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a `victim' in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice".

> *"19. We are conscious of the fact that proceedings under section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. We are also conscious of the fact that compensation awarded under section 357(1)(b) is not intended to be an elaborate exercise taking note of interest etc. Our observations are necessitated due to the need to have uniformity and consistency in decision making. In same type of cheque dishonour cases, after convicting the accused, if some courts grant compensation and if some other courts do not grant compensation, the inconsistency, though perfectly acceptable in the eye of law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. Citizens will not be able to arrange or regulate their affairs in a proper manner as they will not know whether they should simultaneously file a civil suit or not. The problem is aggravated having regard to the fact that in spite of section 143(3) of the Act requiring the complaints in regard to cheque dishonour cases under section 138 of the Act to be concluded within six months from the date of the filing of the complaint, such cases seldom reach finality before three or four years let alone six months. These cases give rise to complications where civil suits have not been filed within three years on account of the pendency of the criminal cases. While it is not the duty of criminal courts to ensure that successful complainants get the cheque amount also, it is their duty to have uniformity and consistency, with other courts dealing with similar cases".*
>
> *(**underlined** by me to supply emphasis)*

18 This was followed by the Hon'ble Supreme Court in yet another case of **Bir Singh vs Mukesh Kumar, (2019) 4 SCC 197**. Para (25) of the said judgment makes relevant reading and is, thus, reproduced hereunder:

> *"25.This Court expressed its anguish that some Magistrates went by the traditional view, that the criminal proceedings were for imposing punishment and did not exercise discretion to direct payment of compensation, causing considerable difficulty to the complainant, as invariably the limitation for filing civil cases would expire by the time the criminal case was decided".*

19 In view of the legal position now well settled, it cannot be contended that while imposing sentence under Section 138 of N.I.Act, the Court should exercise its discretion in imposing fine by having regard to

Section 357 (3) of Cr.P.C. Rather, the Criminal Court should bear in mind the laudable object of engrafting Chapter XVII containing Section 138 to 142 of NI Act and give priority to the compensatory aspect of remedy.

20 Indisputably, the Legislature has given discretion to the Magistrate to impose a sentence of fine which may extend to double the amount of cheque and, therefore, the sentence of fine whenever imposed by the Criminal Court upon conviction of accused under Section 138 of N.I.Act must be sufficient enough to adequately compensate the complainant. The amount of cheque and the date from which the amount under the cheque has become payable along with payment of reasonable interest may serve as good guide in this regard. To be consistent and uniform, it is always advisable to impose a fine equivalent to the amount of cheque plus at least 6% interest per annum from the date of cheque till the date of judgment of conviction. However, before inflicting such fine, the trial Magistrate must eschew the amount of interim compensation, if any, paid under Section 143A of N.I. Act or such other sum which the accused might have paid during the trial or otherwise towards discharge of liability. It may or may not accompany the sentence of simple imprisonment. It is purely in the discretion of the trial Magistrate but having regarding to the object of legislation, it shall be appropriate if the sentence of imprisonment imposed is kept at the minimum unless, of course, the conduct of accused demands otherwise.

21 In the instant case, the trial Court has miserably failed to take all these aspects into consideration and has awarded Rs.2.00 lac, to be paid as compensation to the complainant, when admittedly the cheque amount was to the tune of Rs.10.00 lacs. The petitioner, who was complainant before the trial

Court, has been deprived of a sum of Rs.10.00 lac which amount had become payable to him on the date of issuance of cheque i.e 10.12.2018.

22 For the foregoing reasons, the petition is allowed and the impugned order is set aside to the extent it imposes the sentence upon the respondent. The matter is remanded back to the trial Court for considering the imposition of sentence upon the respondent *de novo* in the light of legal position discussed and the observations made hereinabove. Needless to say that the trial Court shall proceed to consider the matter afresh only after putting the petitioner as well as the respondent on notice.

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The order made by me in the above writ petition shall govern the present petition also.

Before I part, I deem it appropriate to direct the Registrar General of this Court to circulate this judgment to all the Judicial Magistrates subject to jurisdiction of this Court, so that uniformity and consistency in the matter of imposing sentence of fine having regard to the compensatory aspect of remedy under Section 138 of N.I. Act is ensured.

(SANJEEV KUMAR)
JUDGE

Srinagar
22.11.2021
Sanjeev PS

Whether order is speaking:Yes
Whether order is reportable:Yes