



**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

Cr.MMO No.703 of 2019

Date of Decision: 19.11.2019

Rishi Sharma Petitioner

Versus

Prince Thakur Respondent

Coram:

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting?¹ Yes.

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.

For the respondent: Nemo.

Sandeep Sharma, Judge (oral):

Having regard to the nature of the order proposed to be passed in the given facts and circumstances of the case, this Court deems it not necessary to issue notice to the respondent and as such, same is dispensed with.

2. Being aggrieved and dissatisfied with the order dated 19.7.2019, passed by learned Additional Sessions Judge-I, Una, (Circuit Court camp at Amb) District Una, H.P., in Criminal miscellaneous application No.298/2019,

¹ Whether the reporters of the local papers may be allowed to see the judgment?

whereby learned Appellate Court while allowing the application for suspension of sentence awarded by learned Judicial Magistrate, 1st Class, Court No.II, Amb, District Una, H.P. vide judgment/order of conviction/sentence dated 24.5.2019/19.6.2019, passed in complaint No.195-I-11/35-II-2012, directed the petitioner-accused (*hereinafter 'accused'*) to deposit a sum of Rs.1, 16,000/- in the trial Court towards part realization of the compensation, within a period of 30 days, accused has approached this Court in the instant proceedings filed under Section 482 of Cr.P.C, praying therein to set-aside the aforesaid impugned order.

3. In nutshell, grouse of the petitioner-accused is that bare perusal of Section 389 Cr.P.C, nowhere suggests that Appellate Court while considering the application for suspension of sentence, is necessarily required to issue direction to the person in appeal for depositing amount of compensation, if any, awarded by the learned trial Court.

4. At this stage, it would be profitable to reproduce Section 389 Cr.P.C, herein:-

“389. Suspension of sentence pending the appeal; release of appellant on bail—(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.

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the public prosecutor to file an application for the cancellation of the bail]

(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 a 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 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 subsection (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.

5. True, it is that bare perusal of Section 389 of Cr.P.C, which is reproduced hereinabove, nowhere suggests that Appellate Court while considering the application for suspension of sentence cannot order for suspension of sentence awarded by the learned trial Court without calling upon the person seeking suspension of sentence to deposit amount of compensation, if any, awarded by the learned court below. Normally such orders are passed by the Appellate Court to balance the equities and mitigate the hardship caused to a person in whose favour though order of compensation/ payment stands passed but he/she is unable to bear fruit of the same on account of pendency of appeal, if any, having been filed by the opposite party.

6. Solely with a view to mitigate the hardship of complainant, especially in proceedings under Section 138 of the Negotiable Instruments Act, Section 143 of the Act has been incorporated, whereby Courts can order accused to pay 20% of the cheque amount during the pendency of

proceedings under Section 138 of the Act. Aforesaid provision of law has been incorporated with a view to provide interim relief to the complainant, who is unnecessarily compelled to approach the Court of law for realization of his/her own money. Similarly, the appeal is statutory right of a person and such right cannot be allowed to be defeated merely on account of non-deposit of compensation amount, if any, awarded by the learned trial Court.

7. Hon'ble Apex Court in case titled ***Dilip S. Dahanukar vs. Kotak Mahindra Co. Ltd. and another***, (2007) 6 Supreme Court Cases 528, has categorically held that power of Court to suspend the sentence with regard to realization of compensation is totally different from its power to issue direction for realization of fine. Though, in the aforesaid judgment Hon'ble Apex Court has categorically held that Appellate Court while suspending the sentence, is entitled to put appellant on terms, but an order may not be passed which the appellant cannot comply with, resulting

him being sent to the prison. It would be relevant to reproduce following paras of the judgment herein:-

“51. Section 389 does not deal with exactly a similar situation. Section 389 of the Code is to be read with Section 387 thereof. Suspension of a sentence and enlarging an appellant on bail, who is convicted and realization of fine has been dealt with by the Parliament under different provisions of the Code. The power of the Court, thus, to suspend a sentence in regard to realization of compensation may be different from that of a direction in realization of fine.

52. If realization of an amount of compensation payable to a victim as envisaged under Clause (d) of sub-Section (1) of Section 357 is to be stayed under sub-Section (2) thereof, there is no reason why the amount of compensation payable in terms of sub-Section (3) shall not receive the same treatment.

53. Doctrine of Purposive Interpretation in a situation of this nature, in our opinion, shall be applied.

54. In R (Haw) vs. Secretary of State for the Home Department & Anr. [(2006) 3 All ER pp.438-39, paras 42 & 44-45)

"42...a passage from Bennion Statutory Interpretation (4th edn, 2002) 810 (section 304) entitled, 'Nature of purposive construction'. That begins with the following words:

`A purposive construction of an enactment is one which gives effect to the legislative purpose by- (a) following the literal meaning of the enactment

where the meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or (b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction).'

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44. The passage from Bennion continues:

'...I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. [[Kammins Ballroom Co. Ltd. v. Zenith Investments \(Torquay\) Ltd.](#) (1970) 2 All ER 871, [1971] AC 850, [1970] 3 WLR 287] provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill

passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed.'

45. The passage from Bennion continues:

'Lord Diplock's third point is, with respect, erroneous. The argument that in *Jones v. Wrotham Park Settled Estates* Lord Diplock was mistaken in saying that for a rectifying construction to be effected it must be possible to state with certainty what the missing words are, has been endorsed by the House of Lords. Lord Nicholls of Birkenhead said that the court must be sure of "the substance of the provision Parliament would have used" [See *Inco Europe Ltd. v. First Choice Distribution (a firm)* [2000] 2 All ER 109, [2000] 2 All ER 109, [2000] 1 WLR 586]."

{See also *K.L. Gupta vs. Bombay Municipal Corpn.* [(1968) 1 SCR 274 : AIR 1968 SC 303]; *Maruti Udyog Ltd. vs. Ram Lal* [(2005) 2 SCC 638 : 2005 SCC (L&S) 308]; *Reserve Bank of India vs. Peerless General Finance & Investment Co. Ltd.* [(1987) 1 SCC 424]; *Punjab Land Development and Reclamation Corpn. Ltd. vs. Presiding Officer, Labour Court* [(1990) 3 SCC 682]; *Balram Kumawat vs. Union of India* [(2003) 7 SCC 628] and *Pratap Singh vs. State of Jharkhand* [(2005) 3 SCC 682].}

55. Unfortunately, the Legislature has not made any express provision in this behalf. In absence of any express provision, the question must be considered having regard to the overall object of a statute. We have noticed hereinbefore that Article 21 of the Constitution of India read with Section 374 of CrI.P.C. confers a right of appeal. Such a right is an absolute one. In a case where a judgment of conviction has

been awarded, the Court can release a person on bail having regard to the nature of offence but as also the other relevant factors including its effect on society. A person upon arrest may have to remain in jail as an under trial prisoner. So would a person upon conviction. A person may also have to remain in jail, in the event he defaults in payment of fine, if he is so directed. But when a direction is issued for payment of compensation, having regard to Sub-Section (2) of Section 357 of the Code, the application thereof should ordinarily be directed to be stayed. It will, therefore, be for the Court to stay the operation of that part of the judgment whereby and whereunder compensation has been directed to be paid, which would necessarily mean that some conditions therefor may also be imposed. A fortiori a part of the amount of compensation may be directed to be deposited, but the same must be a reasonable amount.

56. An order may not be passed which the appellant cannot comply with resulting him being sent to prison. Appellate Court, in such cases, must make an endeavour to strike a balance. Section 421 of the Code of the Criminal Procedure may take recourse to, but therefor he cannot be remanded to custody.

57. The Parliament has dealt with the imposition of substantive sentence and a sentence of fine vis-à-vis payment of compensation differently.

58. A penal statute, in the event, the different meanings are possible to be given, must be construed liberally in favour of an accused.

59. While the Court shall give due weight to the need of the victim, it cannot ignore the right of an accused. In a case of conflict, construction which favours the accused shall prevail.

60. In a case of this nature, the Court must invoke the doctrine of purposive construction. Sub-Section (2) of Section 357 was enacted for a definite purpose. It must be given its full effect.

61. Reliance has been placed on a judgment of a learned Single Judge of the Andhra Pradesh High Court in V. Prasada Rao vs. The State of A.P. & Anr. [2002 CrL. Law Journal 395]. The learned Judge opined that the purpose of stay in sub-Section (2) of Section 357 would cover a case both under sub-Section (1) as also under sub-Section (3) stating:-
(Cri. LJ p.397, para 8)

"8. The fine amount imposed by the Court as a sentence shall have to be recovered in the first instance so that the whole of the said amount or part of it can be applied towards expenses and towards compensation. The Code clearly envisages recovery of fine amount. The execution, suspension, remission and commutation of sentences passed by a criminal Court is envisaged under Chapter XXXII of the Code. It is in four parts. Part A deals with the death sentences, Part B deals with imprisonment, Part C with levy of fine and Part D deals with general provisions regarding execution. Coming in the realm of Part C. Section 421 envisages the procedure of recovery of fine. There has been no specific provision for recovery of compensation awarded by the criminal Court. If the compensation awarded is from out of the fine amount there is no difficulty. However, under the general provisions of Part D, Section 431 covers the field. It is a residuary provision, which caters to the above piquant situation.

The learned Judge referred to Section 431 of the Code and observed :(Cri. L.J. p 398, para 9)

"9. The object of granting compensation is one and the same under these provisions. When the order of compensation granted under sub-section (1) gets automatically stayed in the event of filing an appeal there is no reason as to why the stay shall not operate in respect of the compensation granted under sub-section (3) of Section 357 of the Code. Merely because sub-section (2) is coming under sub-section (1) and speaks of fine imposed by the Court in an appealable case the benefit of the stay engrafted under the Section cannot be restricted to sub-section (1) alone nor its application be excluded to the provisions of sub-section (3) thereof. It is manifest now even the compensation granted under sub-section (3) of Section 357 shall have to be recovered only as if it were a fine. Consequently, the stay engrafted under sub-section (2) in my considered view equally applies to the compensation granted under sub-section (3) of Section 357 of the Code. It is not a case of suspending the sentence of fine where it is open to the Court to impose a condition either for deposit of a part of the fine amount or for such condition as is appropriate in the context. Section 357 which enables the Court to grant compensation, inheres in itself a bar for such payment of compensation under sub-section (2) which operates automatically. Imposing a condition in this regard has not been clearly envisaged by that Section. Oblivious of the legal position the learned Judge directed the petitioner to furnish third party security."

62. In *K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.* [(1999) 7 SCC 510], this Court held :(SCC p.521, para 31)

"31. However, the Magistrate in such cases can alleviate the grievance of the complainant by making resort to Section 357(3) of the Code. It is well to remember that this Court has emphasised the need for making liberal use of that provision (*Hari Singh v. Sukhbir Singh*). No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation

payable to the complainant. Thus, even if the trial was before a Court of a Magistrate of the First Class in respect of a cheque which covers an amount exceeding Rs 5000 the Court has power to award compensation to be paid to the complainant."

{See also Suganthi Suresh Kumar vs. Jagdeeshan [(2002) 2 SCC 420].}

63. Recently, in National Insurance Co. Ltd. vs. Laxmi Narain Dhut [2007 (4) SCALE 36], a Division Bench of this Court laid down the law in the following terms:(SCC pp 717-18, paras 32-33)

"32. A statute is an edict of the Legislature and in construing a statute, it is necessary to seek the intention of its maker. A statute has to be construed according to the intent of those who make it and the duty of the court is to act upon the true intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. This task very often raises difficulties because of various reasons, inasmuch as the words used may not be scientific symbols having any precise or definite meaning and the language may be an imperfect medium to convey one's thought or that the assembly of Legislatures consisting of persons of various shades of opinion purport to convey a meaning which may be obscure. It is impossible even for the most imaginative Legislature to foresee all situations exhaustively and circumstances that may emerge after enacting a statute where its application may be called for. Nonetheless, the function of the Courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the Legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems

arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for, and, words chosen to communicate such indefinite referents are bound to be in many cases lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words the legislative intention i.e., the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. (See *District Mining Officer and Ors. v. Tata Iron & Steel Co. and Anr.* JT 2001 (6) SC 183).

33. It is also well settled that to arrive at the intention of the legislation depending on the objects for which the enactment is made, the Court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside."

It was also opined:(SCC pp 718-19, para 35)

"35 More often than not, literal interpretation of a statute or a provision of a statute results in absurdity. Therefore, while interpreting statutory provisions, the Courts should keep in mind the objectives or purpose for which statute has been enacted. Justice Frankfurter of U.S. Supreme Court in an article titled as *Some Reflections on the Reading of Statutes* (47 *Columbia Law Reports* 527), observed that,

"legislation has an aim, it seeks to obviate some mischief, to supply an adequacy, to effect a change of policy, to formulate a plan of Government. That

aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statutes, as read in the light of other external manifestations of purpose".

64. We, generally, agree with the observations made by the learned Judge, the same shall, however, be subject to any observations made hereinbefore.

65. The matter has to be considered from another angle. An accused for commission of an offence under Section 138 of the Negotiable Instruments Act would ordinarily be granted bail; in view of the fact that the offence is a bailable one.

66. The right to appeal from a judgment of conviction vis-à-vis the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field.

67. It is of some significance to notice that in *Jolly George Varghese and Another vs. The Bank of Cochin* [(1980) 2 SCC 360], this Court opined:

"10. Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Arts. 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. *Maneka Gandhi's case* [1978] 1 S.C.R. 248 as developed further in *Sunil Batra v. Delhi Administration, Sita Ram and Ors. v. State of U.P. and Sunil Batra v. Delhi Administration* lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his

contractual liability is appalling. To be poor, in this land of daridra Narayana, is no crime and to 'recover' debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the Proviso to Section 51 C.P.C. and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.

11. The words which hurt are "or has had since the date of the decree, the means to pay the amount of the decree". This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of [Article 11\(of the Covenant\)](#) and [Article 21\(of the Constitution\)](#) The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution."

68. It is also of some significance to note that whereas under [Section 357\(1\)](#) of the Code of Criminal Procedure a fine of Rs. 5000/- can be imposed; fine in terms of Section 357(2) thereof can be twice the amount of cheque whereas there is no upper limit for award of a compensation. But the same would be

subject to other provisions [of the Code](#) of Criminal Procedure which mandates that the amount of fine imposed on an accused cannot be more than Rs. 5000/-. The very fact that the Parliament did not think it fit to put a ceiling limit in regard to the amount of compensation leviable upon an accused, the discretionary jurisdiction thereto must be exercised judiciously. Ordinarily, an accused shall not be taken in custody during trial. Thus, while exercising the appellate power, ordinarily, a person should not suffer imprisonment only because the conditions imposed for suspending the sentence are harsh.

69. We are of the opinion that having regard to the aforementioned factors the amount of compensation not only must be reasonable one, the conditions for suspending the sentence should also be reasonable. It is only with that intent in view, the doctrine of purposive construction should be applied.

70. We would, however, like to put a note of caution that the right of an accused unnecessarily need not be enlarged but it is the court's duty to duly protect his right.

71. We are prima facie of the opinion (without going into the merit of the appeal) that the direction of the learned Trial Judge appears to be somewhat unreasonable. Appellant herein has been sentenced to imprisonment. Only fine has been imposed on the Company. Thus, for all intent and purpose, the learned Trial Judge has invoked both Sub-sections (1) and (3) of [Section 357](#) of the Code. The liability of the appellant herein was a vicarious one in terms of [Section 141](#) of the Negotiable Instruments Act. The question may also

have to be considered from the angle that the learned Trial Judge thought it fit to impose a fine of Rs. 25,000/- only upon the Company. If that be so, a question would arise as to whether an amount of compensation for a sum of Rs. 15 lakhs should have been directed to be paid by the Chairman of the Company. We feel that it is not.

72. 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”.

8. Careful perusal of aforesaid exposition of law laid down by the Hon'ble Apex Court, suggests that Appellate Court while suspending the sentence, if any, imposed by the trial Court though is not totally barred or estopped from directing the appellant to deposit the amount, but such amount should be reasonable. In the case at hand, learned Additional Sessions Judge-I, Una, while suspending the

sentence imposed by the trial Court has ordered for deposit of 40% (Rs. 1,16,000) of the compensation amount awarded by the learned trial Court, which is definitely on higher side. ◊

9. Consequently, in view of the above, the present petition is allowed and impugned order dated 19.7.2019 passed by learned Additional Sessions Judge-I, Una, (Camp at Amb) District Una, H.P., is modified and accused is directed to deposit 25% of the compensation amount awarded by the learned trial Court, within a period of four weeks. Pending application(s), if any, also stands disposed of.

**(Sandeep Sharma),
Judge**

19th November, 2019
(shankar)