2023:BHC-NAG:16559

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

CRIMINAL APPLICATION (APL) NO. 566/2023

1) Anuradha Kapoor D/o Manmohan Kapoor
Aged about 60 years, D/o Manmohan Kapoor
R/o A-212, First Floor Shivalik , Malviya nagar
New Delhi.

2) Sanjay Chhabra s/o Chanderprakash Chhabra
Aged about 63 years, R/o S-183, Panchsheel park
Malviya nagar, New Delhi.

3) Arvind Dham w/o Walaiti Lal Dham
Aged about 62 years, R/o B-7, Geetanjali Enclave
Malviya nagar, New Delhi.

4) Gautam Malhotra s/o Deepa Malhotra
Aged about 44 years, R/o B-7 Geetanjali Enclave
Malviya nagar, New Delhi.

5) Bhavya Sehra D/o Bhupendra Kishore Sehra
Aged 33 years, K-13A third Floor
Khirki Extension, Malviya Nagar, New Delhi.

6) Sanjay Arora s/o Daya Ram Arora
Aged 56 years, F. No. 33, Ground floor
Block A1 South city-2, Gurgaon, Haryana. ..APPLICANTS

v e r s u s

1) State of Maharashtra
Through Police Station Officer
MIDC Police Station, Nagpur.

2) M/s MPM Private limited
Through its Authorised attorney
Mr Kushal Salodkar, Aged 36 years, occu: service
having registered office at M-22,

MIDC Hingna Industrial Area
Nagpur 440 016. ..**RESPONDENTS**

…….

Mr D.P. Singh, Advocate with Mr.K.N.Shukul, Advocate for applicants
Ms.Shamsi Haider, APP for Respondent no.1-State
Mr. Anand Jaiswal, Senior Advocate assisted by Mr. S.G.Joshi, Adv.for respondent no.2.

……

CORAM: ANIL L. PANSARE, J.
Date of Reserving : 02.11.2023
Date of Pronouncement : 29.11.2023

JUDGMENT :

Rule. Rule made returnable forthwith. Heard finally, with the consent of the learned counsel for the respective parties.

2. The applicants/original accused in Criminal Complaint filed by the non-applicant no.2-Company under Section 138 of the Negotiable Instruments Act, 1881 (in short, "NI Act") are aggrieved by the order dated 03.11.2022 passed by the learned 2nd Additional Chief Judicial Magistrate, Nagpur (in short, 'Magistrate'), whereby the applicants' application seeking compounding of the offence upon full payment of cheque amount has been rejected. According to the applicants, the order suffers from non-consideration of the law laid down by the Hon'ble Supreme Court, in the case of *Damodar S. Prabhu vs. Sayed Babalal : (2010) Vol.5 SCC 663* and *Meters and Instruments Private Limited vs. Kanchan Mehta : (2018) Vol.1 SCC 560*.

3. Having heard both sides at length, it transpires that the non-applicant no. 2 filed complaint u/s 138 of the NI Act, accusing as

many as 12 entities/ individuals to be responsible for dishonour of cheque amounting to Rs. 15 lakhs. The accused nos. 1 and 2 are a Company, named and styled as Castex Technologies Limited having offices at Haryana and Rajasthan. The accused no.3- John Earnest Flintham is said to be the Managing Director of the Company; accused nos. 4 to 12 are/were the Directors of the accused nos.1 and 2 companies. The applicant No.1 herein is the accused no.8; applicant no.2 is the accused no.7; applicant no.3 is the accused no.4, applicant no.4 is the accused no.5; applicant no.5 is the accused no.10 and applicant no.6 is the accused no.11 respectively. These applicants have been arrayed as accused in the capacity as Directors of the Company with an allegation that they all are involved in the day-to-day affairs of the Company.

4. The allegations against the accused are that they have placed different purchase orders with the non-applicant no. 2-Company/ complainant for supply of Lustron, Inoculant and Nodulant, which are foundry consumables. The non-applicant no.2 has supplied the material for an amount of Rs.3.16 crores approximately and in order to discharge the part liability, the aforesaid cheque was issued by the accused-Company. The cheque was for Rs.15 lakhs bearing No.805627 dated 23.12.2017 drawn on State Bank of India, Finance branch, New Delhi. The cheque was presented for encashment, but returned back unpaid with the remarks “insufficient funds”. After complying with other necessary formalities like issuance of notices etc., the complaint in question has been filed, u/s.138 read with Section 142 of the NI Act as well as Section 420 of the Indian Penal Code.

5. Mr.D.P. Singh, the learned counsel for the applicants submits

that on 20.12.2017,Castex Technologies Limited/accused-Company was admitted to insolvency upon an application by SBI, being petition No.CP(IB)No.116/Chd/Hry/2017. The Interim Resolution Professional was appointed vide order dated 22.12.2017 for all suits and proceedings against the Company. The learned counsel further submits that the non-applicant no.2 has filed its claim before IBC on 30.01.2018. The statutory notice u/s. 138 was sent to all the Directors on 08.02.2018, on the address of the Company, when pursuant to Sec.17 of the IBC Code, all Directors stood divested of all their powers. He contends that the issue of notice, therefore, was an abuse of process in itself because the non-applicant no.2 was in the knowledge of the fact that the Company was admitted to IBC process. He submits that the entire liability of the non-applicant no.2 has been satisfied by the CIRP process and the Resolution Plan has been accepted on 15.12.2020. These facts have been allegedly concealed by the non-applicant no.2 from trial Court, as also from this Court and, thus, the process of law is *mala fide.*

6. Despite the above, the applicants on 11.12.2018 have filed an application accompanied by a demand draft issued in the name of the non-applicant no.2-Company for the entirety of the cheque amount, seeking compounding of offence. This application has been rejected by the learned Magistrate on the ground that the non-applicant no.2-Company is not ready to compound the offence. The learned Magistrate has taken aid of the judgment in the case of *JIK Industries Limited and others vs. Amarlal V. Jumani & another: (2012) 3 SCC 255,* which was relied upon by the non-applicant no.2 -complainant.

7. The learned counsel for the applicants has invited my attention to *Damodar's* case (*supra*). The Hon'ble Supreme Court has considered the scope of Section 147 of the NI Act which relates to compounding offence and noted that this Section does not prescribe a stage appropriate for compounding the offence and is silent on the point whether the same can be done at the instance of the complainant or with the leave of the Court. The Supreme Court has then considered various provisions of the NI Act as also the Scheme contemplated by Section 320 of the Code of Criminal Procedure, 1973 (for short, "the Code") and issued the following guidelines :-

THE GUIDELINES

" (a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any cost on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at the subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court the figure would increase to 20% of the cheque amount.

Let it also be clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place. For instance, in case of compounding during the pendency of proceedings before a Magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the State Legal Services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority."

8. These guidelines fell for consideration before the Supreme Court, in the case of *JIK Industries* (supra). The Supreme Court considered the effect of sanction of compromise scheme / arrangement made between the complainant creditors therein and members of accused u/s. 391 of the Companies Act, 1956 for payment of debts due to such creditors. The challenge was to the High Court's order which, while dismissing the writ petition, held that sanction of scheme u/s. 391 of the Companies Act, 1956 does not amount to compounding an offence u/s 138 read with Sec.141 of the NI Act. However, the High Court made it clear that the petitioners before the High Court will not be prevented from filing separate application invoking the provisions of Section 482 of the Code if they are so advised. The Supreme Court while upholding the High Court's order, has held that the sanction of scheme u/s 391 of the Companies Act will not result in automatic compounding of offence u/s 138 of the N.I. Act without consent of the complainant(s). The Supreme Court further held that even if the complainant creditors are bound by the scheme u/s 391 of the Companies Act for civil consequences, the compounding of criminal offence can be done only as per the statutory procedure i.e. Sec.320 of the Code and only if persons aggrieved have given their consent for the same. As regards the

guidelines issued in *Damodar's* case, the Supreme Court has noted its effect and the scope of Section 147 of the N.I. Act read with Section 391 of the Code. Para nos. 41, 76 to 80 and 82, which read thus:

*"**41**. The Court held in para 26 of Damodar that those guidelines have been issued by this Court under Article 142 of the Constitution in order to fill up the legislative vacuum which exists in Section 147 of the NI Act. The Court held that Section 147 of the NI Act does not carry any guidance on how to proceed with the compounding of the offence under the NI Act and the Court felt that Section 320 of the Code cannot be strictly followed in the compounding of the offence under Section 147 of the NI Act. Those guidelines were given to fill up a legislative vacuum.*

76. *.....The decision in Damodar was rendered by referring to Article 142 of the Constitution insofar as guidelines were framed in relation to compounding for reducing pendency of 138 cases. In doing so the Court held that attempts should be made for compounding the offences early. Therefore, the observations made in para 24 of Damodar that the scheme contemplated under Section 320 of the Code cannot be followed "in the strict sense" does not and cannot mean that the fundamental provisions of compounding under Section 320 of the Code stand obliterated by a side-wind, as it were.*

77. *It is well settled that a judgment is always an authority for what it decides. It is equally well settled that a judgment cannot be read as a statute. It has to be read in the context of the facts discussed in it. Following the aforesaid well-settled principles, we hold that the basic mode and manner of effecting the compounding of an offence under Section 320 of the Code cannot be said to be not attracted in case of compounding of an offence under the NI Act in view of Section 147 of the same.*

78. *Compounding as codified in Section 320 of the Code has a historical background. In common law compounding was considered a misdemeanour. In Kenny's Outlines of Criminal law (19th Edn., 1966) the concept of compounding has been traced as follows : (p.407, para 422).*

> *" 422. **Mercy should be shown, not sold** - It is misdemeanour at common law to 'compound' a felony (and perhaps also to compound a misdemeanour); i.e. to bargain, for value, to abstain from prosecuting the offender who has committed a crime. You commit this offence if you promise a thief not to prosecute him if only he will return the goods he stole from you; but you may lawfully take them back if you make no such promise. You may show mercy, but must not sell mercy. This offence of compounding is committed by the bare act of agreement; even though the compounder afterwards breaks his agreement and prosecutes the criminal. An inasmuch as the law permits not merely the person injured by a crime, but also all other members of the community, to prosecute, it is criminal for anyone to make such composition; even though he suffered no injury and indeed as no concern with the crime"*
>
> *(emphasis in original)*

79. *Russell on Crime* (12th Edn.) also describes :

> *" Agreements not to prosecute or to stifle a prosecution for a criminal offence are in certain cases criminal"*
>
> *(Ch.22 -Compounding Offences, p. 339)*

80. *Later on compounding was permitted in certain categories of cases where the rights of the public in general are not affected but in all cases such compounding is permissible with the consent of the injured party.*

82. *A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub-sections is a code by itself relating to compounding of offence. It provides for the various parameters and procedure and guidelines in the matter of compounding. If this Court upholds the contention of the appellant that as a result of incorporation of Section 147 in the NI Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the NI Act, in that case the compounding of offence under the NI Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or*

unreasonable one will also be contrary to the provisions of Section 4(2) of the Code, which has been discussed above. There is no other statutory procedure for compounding of offence under the NI Act. Therefore, Section 147 of the NI Act must be reasonably construed to mean that as a result of the said Section the offences under the NI Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of the NI Act."

9. Mr. Anand Jaiswal, the learned Senior Counsel for the non-applicant no.2 has placed heavy reliance upon the *JIK's* case, to contend that compounding of the offence without consent of the complainant is not permissible.

10. At this stage, the learned counsel for the applicants submits that the *JIK's c*ase has been overruled, in the case of *Meters & Instruments Pvt. Ltd. vs. Kanchan Mehta, reported in (2018) 1 SCC 560: MANU SC/1256/2017*. The challenge was to the order passed by the High Court of Punjab & Haryana rejecting the prayer of the appellants therein for compounding offence u/s 138 of the NI Act on payment of the cheque amount. The facts of the case were enumerated in paragraph 4 which reads thus :

> *"4. Appellant No.2, who is the Director of appellant No.1, made a statement that he was ready to make the payment of the cheque amount. However, the complainant declined to accept the demand draft. The case was adjourned for evidence. The appellants filed an application Under Section 147 of the Act on 12th January, 2017 relying upon the judgment of this Court in Damodar S. Prabhu v. Sayed Babalal H. MANU/SC/0319/2010: (2010) 5 SCC 663. The application was dismissed in view of the judgment of this Court in JIK Industries Ltd. v. Amarlal V. Jumani: MANU/SC/0075/2012 : (2012) 3 SCC 255 which*

required consent of the complainant for compounding. The High Court did not find any ground to interfere with the order of the Magistrate. Facts of the other two cases are identical. Hence these appeals."

11. The Supreme Court has considered and noted the object of introducing Section 138 and other provisions in the NI Act; the guidelines in *Damodar's* case as also the other judgments of the Supreme Court and observed in paras 18 and 19 as under :

"**18.** From the above discussion following aspects emerge :

i) Offence Under Section 138 of the Act is primarily a civil wrong. Burden of proof is on Accused in view presumption Under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Code of Criminal procedure but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 of the Code of Criminal procedure will apply and the Court can close the proceedings and discharge the Accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.

ii) The object of the provision being primarily compensatory, punitive element being mainly with the object enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

(iii) Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the Accused.

(iv) Procedure for trial of cases under Chapter XVII of the Act

has normally to be summary. The discretion of the Magistrate under second proviso to section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the court has jurisdiction under Section 357(3) Code of Criminal Procedure to award suitable compensation with default sentence under Section 64 Indian Penal Code and with further powers of recovery Under Section 431 Code of Criminal Procedure. With this approach, prison sentence of more than year may not be required in all cases.

(v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonour of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Code of Criminal procedure. The scheme is to follow summary procedure except where exercise of power under second proviso to section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357 (3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the Accused or any other circumstances.

***19**. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers Under Section 143 of the Act read with Section 258 Code of Criminal Procedure. As already observed, normal Rule for trial of cases under Chapter XVII of the Act is to follow the summary procedure and summons trial procedure can be followed where sentence exceeding one year may be necessary taking into account the fact that compensation under Section 357(3) Code of Criminal Procedure with sentence of less than one year will not be adequate, having regard to the amount of the cheque, conduct of the Accused and other circumstances."*

12. The learned counsel for the applicants, by relying upon clause(iii) of paragraph 18 of the above judgment, submits that even in absence of consent of complainant, the Court on being satisfied that the complainant has been duly compensated can compound the offence.

13. Mr.Jaiswal, the learned Senior Advocate for the non-applicant no.2 has vehemently argued that *JIK's* judgment has been not overruled. He further submits that, what *Meters & Instrument's* judgment provides is a small window where it is open for the courts to compound the offence even when there is no consent, but the Court has to see that the complainant is duly compensated. He further submits that the expression 'compensated' does not mean the value of the cheque but when the entire dispute between the parties is sorted out. He submits that the applicants herein have nowhere stated or offered to compensate the non-applicant no.2 and mere offer of paying the cheque amount does not amount to compensation.

14. The learned senior counsel has then invited my attention to paragraph 24 of the judgment of the Supreme Court in Suo Motu Writ Petition (Cri) No.2/2020 decided on 16.04.2021 and submits that the judgment of *Meters & Instruments,* to contend that the larger Bench has not approved in totality the version in Meters & Instruments' case. The relevant part finds place in clause (7) of paragraph 24 of the judgment which reads thus :

> *"7) Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act empowering the Trial Courts to reconsider/recall summons in*

respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021."

15. To my mind, and as rightly pointed out by the learned counsel for the applicants, the Supreme Court in the aforesaid judgment has not overruled the judgment in *Meters & Instruments*. What has been said in Suo Motu Petition is that the judgment in Meters & Instruments in so far as it conferred power on the trial Court to discharge the accused is not a good law.

16. Nonetheless, the question before the Court is how to reconcile with the pronouncements of the Supreme court in the cases of *JIK Industries* and *Meters & Instruments*. Both the judgments have been passed by the bench consisting of two judges. Both the judgments have taken into consideration the guidelines laid down in *Damodar's* case which was a bench consisting of three Judges. In the first glance, it appears that there are conflicting views of the Apex Court as regards operation of the guideline issued in *Damodar's* case. However, a close scrutiny of these two judgments would reveal that, while keeping the guidelines issued in *Damodar's* case intact, the scope of Section 147 of the N.I. Act has been further explained. The guidelines issued in *Damodar's* case have been explained in *JIK Industries* case in the following manner in paragraph 76, which read thus:

"76. Both these aforesaid decisions were referred to and approved in Damodar. The decision in Damodar *was rendered by referring to Article 142 of the Constitution insofar as guiudelines were framed in relation to compounding for reducing pendency of 138 cases. In doing so the Court held that*

attempts should be made for compounding the offences early. Therefore, the observations made in para 24 of Damodar, that the scheme contemplated under Section 320 of the Code cannot be followed "in the strict sense" does not and cannot mean that the fundamental provisions of compounding under Section 320 of the Code stand obliterated by a side-wind, as it were.

17. The importance and effect of Section 320 of the IPC *vis-a-vis* section 147 of NI Act has been further explained in paragraph 82 as under :-

> ***82.*** *A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub-sections is a code by itself relating to compounding of offence. It provides for the various parameters and procedure and guidelines in the matter of compounding. If this Court upholds the contention of the appellant that as a result of incorporation of Section 147 in the NI Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the NI Act, in that case the compounding of offence under the NI Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or unreasonable one will also be contrary to the provisions of Section 4(2) of the Code, which has been discussed above. There is no other statutory procedure for compounding of offence under the NI Act. Therefore, Section 147 of the NI Act must be reasonably construed to mean that as a result of the said Section the offences under the NI Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of the NI Act."*

18. The above finding has been rendered in the case where the Supreme Court was testing the contentions of the appellants therein that, as a result of sanction of scheme u/s 391 of the Companies Act, there is an automatic compounding of offence u/s 138 of the NI Act

even without the consent of the complainant.

19. In *Meters & Instruments* case, the Apex Court has not only considered the guidelines issued in *Damodar's* case, but has also considered the challenge to the order passed by the learned Magistrate, which has, by relying upon the *JIK's* case, rejected the application seeking compounding of offence. The Supreme Court after having considered the law laid down by it in various cases, has extracted the important aspects, one of which has been noted in clause (iii) of paragraph 18 wherein the Court noted that though the compounding of offence requires consent of both the parties, even in absence of such consent, the Court in the interest of justice, on being satisfied that the complainant has been duly compensated can in its discretion, close the proceedings.

20. Thus, in *JIK*, the Apex Court has, in the peculiar facts and circumstances of the case, held that there cannot be an automatic compounding of offence u/s 138 of the NI Act without the consent of the complainant. As against, in *Meters & Instrument*, the Supreme Court has held that in appropriate cases, the offence u/s 138 of the NI Act could be compounded even in absence of such consent. It cannot be, therefore, said that the judgment in *JIK* has been overruled in *Meters & Instrument*, since the judgment has been passed in two different sets of facts. In any case, both the judgments being of the Bench consisting of two Judges, the judgment passed by the earlier Bench cannot be set aside by the subsequent Bench consisting of equal number of Judges. As stated earlier, in *JIK*, it has been held that there cannot be automatic compounding of offence whereas in *Meters & Instrument*, the Supreme

Court arrived at a conclusion that in appropriate cases, the offence could be compounded without such consent.

21. The question, therefore, is whether the present case is an appropriate case where the consent of non-applicant no.2 for compounding the offence, could be ignored. The answer is as follows :

In *Damodar's* case, the first guideline i.e. guideline stipulated in para (i) reads as under :

> *"(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any cost on the accused."*

The guideline clearly stipulates that when writ of summons is issued, the accused is made to know that he could make an application for compounding the offence at the first or second date of hearing of the case and that if such an application is made, the compounding may be allowed by the Court without imposing any costs on the accused. Thus, the accused is made to believe that if he files an application for compounding offence at the initial stage of the case, the compounding will not only be allowed but will be allowed without imposing costs. The question, therefore is, if the accused in response to the writ of summons files application for compounding offence, can the Court or will it be appropriate for the Court to reject the application on the ground of absence of consent of the complainant, particularly when the accused is not put to notice that compounding will be allowed only if the

complainant extends his consent. To my mind, in normal circumstances, when the application for compounding offences u/s 138 of the NI Act is made at the initial stage of the case and if the complainant is duly compensated, the trial Court will be fully justified in compounding the offence without consent of the complainant.

22. The purpose behind the intimation to the accused that he could make an application for compounding is to encourage settlement, considering the nature of dispute u/s 138 of the N.I. Act. Para Nos. 12 and 13 in *Damodar's* case on this aspect, is relevant which read thus:

> *"12. It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point we can refer to the following extracts from an academic commentary (Cited from: K.N.C. Pillai R.V. Kelkar's Criminal Procedure, 5th edn. (Lucknow :Eastern Book Company ,2008) at p. 444):*
>
> *A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences and some others as compoundable only with the permission of the Court. ……..*
>
> *In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act (Cited from : Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act -Tackling an avalanche of cases (New Delhi; Universal law Publishing Co. Pvt.ltd., 2009) at p.5)*

….Unlike that for other forms of crime, the punishment here (insofar 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.

13. 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 the 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. As mentioned earlier, the learned Attorney General's submission is that in the absence of statutory guidance, parties are choosing compounding as a method of last resort instead of opting for it as soon as the Magistrates take cognizance of the complaints. One explanation for such behaviour could be that the accused persons are willing to take the chance of progressing through the various stages of litigation and then choose the route of settlement only when no other route remains. While such behaviour may be viewed as rational from the viewpoint of litigants, the hard facts are that the undue delay in opting for compounding contributes to the

arrears pending before the courts at various levels. If the accused is willing to settle or compromise by way of compounding of the offence at a later stage of litigation, it is generally indicative of some merit in the complainant's case. In such cases it would be desirable if parties choose compounding during the earlier stages of litigation. If however, the accused has a valid defence such as mistake, forgery or coercion among other grounds, then the matter can be litigated through the specified forums."

23. The Supreme Court has noted the ground realities and practicalities in the cases filed under Sec.138A of the N.I.Act. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The Court noted that bulk number of cases were settled and accordingly observed that with respect to the offence of dishonour of cheque, it is compensatory aspect of the remedy which should be given priority over the punitive aspect. The Supreme Court took into account the delaying tactics of the accused in opting for compounding and thus suggested that, in such cases it would be desirable if parties choose compounding during the earlier stages of litigation, subject to availability of the valid defence as noted in the order. Accordingly, the Supreme Court issued directions to modify writ of summons to the accused making it clear to him of availability of option of compounding.

24. In the present case, the complaint has been filed on 29.03.2018, the summons is said to have been issued in April, 2018. Advocates appeared through counsel. On 11.12.2018 the applicants have filed an application seeking compounding of offence. Demand draft of the entire amount of cheque was also annexed. Strictly speaking, the applicants have not filed the application on 1st or 2nd hearing of the case

but have filed the same on third hearing of the case which can be said to be an initial stage. This application has been filed in response to the summons issued by the Court making it clear that if the applicants would make an application for compounding of offence at the first or second hearing of the case, the compounding may be allowed. In the circumstances, unless the complainant puts forth the justifiable reason to not give consent, in my considered view, the cumulative effect of the law laid down in *Damodar's* case read with *JIK* and *Meter & Instrument's* case would require the trial Court to consider the application seeking compounding of offence favourably, else the very purpose of issuance of summons with accompaniment encouraging accused to opt for compounding offence and the guidelines issued in *Damodar's* case as clarified in *Meters & Instruments* case would be frustrated/defeated.

25. It appears that the attention of learned Magistrate was not invited to the guidelines issued in *Damodar's* case, as clarified in *Meters & Instrument's* case and, therefore, the learned Magistrate has by relying upon the *JIK's* case, declined to compound the offence.

26. Having said that the learned Magistrate ought to have considered the application favourably, the valid question raised by the non-applicant no.2 as to whether it has been duly compensated will have to be answered. According to learned Senior Counsel "duly compensated" does not mean value of cheque but the entire dispute between the parties is sorted out. According to him, the admitted dues are over Rs.3 crores and, therefore, by offering the cheque amount, the non-applicant no.2 cannot be said to be duly compensated.

27. I am not inclined to render my acceptance to the aforesaid argument. The concept of "duly compensated" will have to be considered, understood and answered in the light of the provisions of the N.I. Act. Admittedly, the disputed cheque is for Rs. 15 lakhs. The cheque was issued on 23.12.2017; the application for compounding offence has been filed on 11.12.2018. In the circumstances, the non-applicant no.2 could be said to be duly compensated if in addition to the amount of cheque, the applicants are willing to pay an interest at the rate of 9 per cent *per annum,* on the cheque amount for the period from the date of issuance of cheque i.e. December 2017 till the date on which the application was made i.e. December, 2018. In addition to the component of interest, in my view, an amount of Rs. 25,000/- as litigation costs will suitably compensate the non-applicant no.2.

28. Though the N.I. Act provides that interest @18 per cent is payable, however and since the applicants have responded to the summons issued by the court by filing application for compounding offence at the initial stage of the proceedings but not on the first or second date of hearing, the interest at the rate of 9 per cent, in my view, will be reasonable to suitably compensate the non-applicant no.2.

29. The learned counsel for the applicants has shown their willingness to pay the aforesaid amount. That being so, the application seeking compounding of offence requires favourable consideration in terms of the judgments of the Apex Court referred to in the earlier part of the order.

30. Secondly, the applicants have come up with the case that despite the proceedings u/s. 14 of the Insolvency & Bankruptcy Code, 2016 having been initiated and despite the Interim Resolution Professional being appointed, the applicants are willing to pay the amount.

31. The non-applicant no.2, thus, appears to have raised his claim for recovery of the amount on 03.01.2018 before the IRP. Admissible recovery, whether of Rs.3 crores or otherwise, will be considered before the IRP and in terms of the provisions of the IBC Code, 2016. In the circumstances, to not offer consent on the ground that the applicants owe dues to the non-applicant no.2 to the tune of Rs. 3 crores is, in my considered opinion, an abuse of process of law and, therefore, by invoking the jurisdiction u/s 482 of the Code, this attempt will have to be and stands nipped down.

32. The last question that requires answer is whether it will be permissible for six accused (the present applicants) out of twelve, to seek compounding of offence. The applicants have referred to the judgment of the Allahabad High Court, in the case of *Gaganpal Singh Ahuja & others vs. State of U.P. & others*, reported in *2023(6) ADJ 223*, which was required to consider whether piecemeal compromise and compounding thereof is permissible. The Court has held as under :-

> *" 22. .....The compromise, in the modern society, is the sine qua non of a harmony and orderly behaviour. The soul of the justice and if the power under section 482 Cr.P.C. is used to enhance such compromise which, in turn, enhances the social amity and reduces fiction, then it is a "finest hour of the justice". Dispute which has their genesis in a matrimonial discord,*

landlord-tenant matters, commercial transactions and other such matters can safely be dealt by the Court by exercising its powers under Section 482 Cr.P.C. In the event of the compromise, the said power is to be used in its true sense and in its totality and shall not be used in its abridged form. There can never be any such rigid rules prescribed in exercise of such power, especially in the absence of any premonitions to forecast and predict eventualities which the cause of justice may throw up during the course of litigation.

23. The power to do complete justice is the very essence of every judicial justice dispensation system. It cannot be diluted by the distorted perceptions and is not slave to anything, except to caution and circumspection, the standard of which the Court sets before it, in exercise of such plenary and unflattered power inherently vested in it while donning the cloak of compassion to achieve the end of justice. No embargo, be in a shape of Section 320 Cr.P.C. or any other such curtailment, can whittle down the powers under section 482 Cr.P.C."

32. As mentioned above, the scope and ambit of Section 482 Cr.P.C. is in much wider than that of Section 320 of Cr.P.C."

33. The Hon'ble Supreme Court, in the case of *Lovely Salhotra & another vs. State of NCT, Delhi : MANU/SC/0816/2017*, while dealing with the inherent jurisdiction of the Court under Section 482 of the Code, has held as under :

"4. We have taken into account the fact of the matter in question as it appears to us that no cognizable offence is made out against the appellant-herein. The High Court was wrong in holding that the F.I.R. cannot be quashed in part and it ought to have appreciated the fact that the appellants-herein cannot be allowed to suffer on the basis of the complaint filed by Respondent No.2-herein only on the ground that the investigation against co-accused is still pending. It is pertinent to

note that the learned Magistrate has opined that no offence is made out against co-accused nos. 2,3,4 and 6 prima facie.

34. Similarly, in the case of *Vijay Kumar Gupta vs. State Government of NCT Delhi* in Criminal Misc. No.2289/2013 dated 09.03.2017, the High Court of Delhi in paragraph no.7 has observed thus:-

> *"7. Looking into the facts and circumstances of the case and the fact that the petitioners have paid the loan/ settlement amount to the Respondent No.2 and nothing remains to be adjudicated further, to remove the hurdle in the personal life of the present petitioners for leading better and peaceful life and to meet the ends of justice, I deem it appropriate to quash the FIR No. 1087/2003, under Section 406, 420, 468, 471 of the Indian Penal Code, 1860 registered at Police Station Parliament Street, Delhi qua against the petitioners, namely Vijay Kumar Gupta, Rajkumar Sharma and Vinod Choudhary only to the extent of their role in commission of the alleged offence."*

35. Mr. Anand Jaiswal, the learned Senior Counsel for the non-applicant/respondent no.2 has opposed piecemeal compromise by contending that such compounding is an exception and may be permissible where the complainant has given consent to the compromise and not otherwise. He submits that in *Gaganpal Singh Ahuja's* case (supra) piecemeal compounding was recognised because the complainant has given consent to compounding the offence. However, in the present case, the complainant has not given such consent and, therefore, the said judgment will not be applicable to the facts of the present case. As regards *Vijay Kumar's* case (supra), the learned Senior Counsel submits

that the judgment relates to quashing of first information report and not compounding of offence.

36. To my mind, the *ratio decidendi* in the above cases is that in appropriate cases, a piecemeal compromise and compounding is permissible. The non-applicant is getting adequate compensation. In the circumstances, having given my thoughtful consideration to the attending circumstances, the request to compound the offence will have to be allowed.

37. The present case appears to me to be a fit case where powers under Section 482 of the Code must be exercised, considering the peculiar facts and circumstances of the case. Hence, following order is passed:-

ORDER

i) The Criminal Application No.566/2023 is allowed.

ii) The impugned order dated 03.11.2022 passed by learned ACMM in SCC No. 6061/2018 is set aside. Offence punishable under Section 138 of the NI Act against the applicants stands compounded, subject to applicants depositing in the trial Court, by way of demand draft, an amount of Rs. 15,00,000/- (Rupees fifteen lakhs) along with interest at the rate of 9% from 23rd December, 2017 to 11th December, 2018 as also Rs. 25,000/- towards cost of litigation within fifteen working days from the date of this judgment, which amount the non-applicant no.2 shall be entitled to withdraw.

iii) The applicants shall stand discharged on the day the aforesaid demand draft is deposited in the trial Court.

iv) No cost is payable to the District Legal Services Authority for the

reason that the application for compounding offence has been filed at the initial stage.

Rule is made absolute in the aforesaid terms.

(ANIL L. PANSARE, J.)

After pronouncement of the judgment, Mr.S.G.Joshi, learned counsel for the respondent no.2 makes a request to stay the effect and operation of the order on the premise that the respondent no.2 intends to challenge the order before the Hon'ble Supreme Court.

The request being reasonable, the effect and operation of the judgment and order is stayed for a period of six weeks from today.

(ANIL L. PANSARE, J.)

sahare