

M/S Meters And Instruments Private ... vs Kanchan Mehta on 5 October, 2017

Equivalent citations: (2017) 4 ICC 714, AIR 2017 SUPREME COURT 4594, AIRONLINE 2017 SC 14, 2018 CRI LJ 1160, AIR 2017 SC (CRIMINAL) 1563, (2018) 183 ALLINDCAS 193 (SC), (2017) 12 SCALE 303, (2017) 2 ALD(CRL) 958, (2017) 2 NIJ 583, (2017) 2 ORISSA LR 1069, (2017) 3 ALLCRIR 2722, (2017) 3 UC 2090, (2017) 4 ALLCRILR 689, (2017) 4 BANKCAS 315, (2017) 4 BOMCR(CRI) 392, (2017) 4 CIVILCOURTC 587, (2017) 4 CRILR(RAJ) 1043, (2017) 4 CRIMES 1, (2017) 4 DLT(CRL) 82, (2017) 4 JLJR 265, (2017) 4 PAT LJ 253, (2017) 4 PUN LR 409, (2017) 4 RAJ LW 3376, (2017) 68 OCR 965, (2017) 6 BOM CR 437, 2017 CRILR(SC MAH GUJ) 1043, 2017 CRILR(SC&MP) 1043, (2018) 102 ALLCRIC 953, (2018) 183 ALLINDCAS 193, (2018) 1 CURCRIR 47, (2018) 1 MADLW(CRI) 464, (2018) 1 RAJ LW 202, 2018 (1) SCC 560, 2018 (1) SCC (CRI) 477, (2018) 246 DLT 217, (2018) 2 CIVLJ 821, (2018) 3 MH LJ (CRI) 1, (2018) 3 MPLJ 48, (2018) 4 MAH LJ 1, (2019) 1 NIJ 583, AIR 2017 SC(CRI) 1563

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Bench: Uday Umesh Lalit, Adarsh Kumar Goel

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1731 OF 2017
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO.5451 OF
2017)

M/S. METERS AND INSTRUMENTS PRIVATE LIMITED
& ANR. ...APPELLANTS

VERSUS

KANCHAN MEHTA

...RESPONDENT

WITH

CRIMINAL APPEAL NO. 1732 OF 2017
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO.5441 OF
2017)

WITH

CRIMINAL APPEAL NO. 1733 OF 2017
(ARISING OUT OF SPECIAL LEAVE PETITION (CRL.) NO.5449 OF
2017)

JUDGMENT

ADARSH KUMAR GOEL, J.

1. Leave granted. These appeals have been preferred against the order dated 21st April, 2017 of the High Court of Punjab and Reason: 2017. The High Court rejected the prayer of the appellants for compounding the offence under Section 138 of the Negotiable Instruments Act, 1881 (the Act) on payment of the cheque amount and in the alternative for exemption from personal appearance.

2. When the matters came up for hearing before this Court earlier, notice was issued to consider the question “as to how proceedings for an offence under Section 138 of the Act can be regulated where the accused is willing to deposit the cheque amount. Whether in such a case, the proceedings can be closed or exemption granted from personal appearance or any other order can be passed.” The Court also appointed Mr. K.V. Viswanathan, learned senior counsel to assist the Court as amicus and Mr. Rishi Malhotra, learned counsel to assist the amicus. Accordingly, learned amicus has made his submissions and also filed written submissions duly assisted by S/Shri Rishi Malhotra, Ravi Raghunath, Dhananjay Ray and Sidhant Buxy, advocates. We place on record our appreciation for the services rendered by learned amicus and his team.

3. Few Facts: The Respondent Kanchan Mehta filed complaint dated 15th July, 2016 alleging that the appellants were to pay a monthly amount to her under an agreement. Cheque dated 31 st March, 2016 was given for Rs.29,319/- in discharge of legal liability but the same was returned unpaid for want of sufficient funds. In spite of service of legal notice, the amount having not been paid, the appellants committed the offence under Section 138 of the Act. The Magistrate vide order dated 24th August, 2016, after considering the complaint and the preliminary evidence, summoned the appellants. The Magistrate in the order dated 9 th November, 2016 observed that the case could not be tried summarily as sentence of more than one year may have to be passed and be tried as summons case. Notice of accusation dated 9th November, 2016 was served under Section 251 Cr.P.C.

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 12 th January, 2017 relying upon the judgment of this Court in Damodar S. Prabhu versus Sayed Babalal H.1 The application was dismissed in view of the judgment of this Court in JIK Industries Ltd. versus Amarlal versus Jumaniz 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 other two cases are identical. Hence these appeals. 1 (2010) 5 SCC 663 2 (2012) 3 SCC 255

5. We have heard learned counsel for the parties and learned amicus who has been duly and ably assisted by S/Shri Rishi Malhotra, Ravi Raghunath, Dhananjay Ray and Sidhant Buxy, advocates. We proceed to consider the question.

6. The object of introducing Section 138 and other provisions of Chapter XVII in the Act in the year 1988 3 was to enhance the acceptability of cheques in the settlement of liabilities. The drawer of cheque is made liable to prosecution on dishonour of cheque with safeguards to prevent harassment of honest drawers. The Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to amend the Act was brought in, inter-alia, to simplify the procedure to deal with such matters. The amendment includes provision for service of summons by Speed Post/Courier, summary trial and making the offence compoundable.

7. This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions cheques were issued merely as a device to defraud the creditors. Dishonour of cheque causes incalculable loss, injury and inconvenience to the 3 Vide the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 payee and credibility of business transactions suffers a setback 4. At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 amendment specifically made it compoundable 5. The offence was also described as ‘regulatory offence’. The burden of proof was on the accused in view of presumption under Section 139 and the standard of proof was of “preponderance of probabilities” 6 . The object of the provision was described as both punitive as well as compensatory. The intention of the provision was to ensure that the complainant received the amount of cheque by way of compensation. Though proceedings under Section 138 could not be treated as civil suits for recovery, the scheme of the provision, providing for punishment with imprisonment or with fine which could extend to twice the amount of the cheque or to the both, made the intention of law clear. The complainant could be given not only the cheque amount but double the amount so as to cover interest and costs. Section 357(1)(b) of the Cr. P.C. provides for payment of compensation for the loss caused by the offence out of the fine⁷. Where fine is not imposed, compensation can be 4 Goa Plast (P) Ltd. v. Chico Ursula D’Souza (2004) 2 SCC 235 5 Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd.(2008) 2 SCC 305 6 Rangappa v. Sri Mohan (2010) 11 SCC 7 R. Vijayan v. Baby (2012) 1 SCC 260 awarded under Section 357(3) Cr.P.C. to the person who suffered loss. Sentence in default can also be imposed. The object of the provision is not merely penal but to make the accused honour the negotiable instruments⁸.

8. In view of the above scheme, this Court held that the accused could make an application for compounding at the first or second hearing in which case the Court ought to allow the same. If such application is made later, the accused was required to pay higher amount towards cost etc⁹. This Court has also laid down that even if the payment of the cheque amount, in terms of proviso (b) to Section 138 of the Act was not made, the Court could permit such payment being made immediately after receiving notice/summons of the court¹⁰. The guidelines in Damodar (Supra) have been held

to be flexible as may be necessary in a given situation¹¹. Since the concept of compounding involves consent of the complainant, this Court held that compounding could not be permitted merely by unilateral payment, without the consent of both the parties.¹² 8 Lafarge Aggregates & Concrete India (P) Ltd. v. Sukarsh Azad (2014) 13 SCC 779 9 Damodar S. Prabhu (supra) 10 (2006) 6 SCC 456, (2007) 6 SCC 555 11 Para 23 in Madhya Pradesh State Legal Services Authority versus Prateek Jain and Anr. (2014) 10 SCC 690 12 Rajneesh Aggarwal v. Amit J. Bhalla (2001) 1 SCC 631

9. While the object of the provision was to lend credibility to cheque transactions, the effect was that it put enormous burden on the courts' dockets. The Law Commission in its 213th Report, submitted on 24th November, 2008 noted that out of total pendency of 1.8 crores cases in the country (at that time), 38 lakh cases (about 20% of total pendency) related to Section 138 of the Act. This Court dealt with the issue of interpretation of 2002 amendment which was incorporated for simplified and speedy trials. It was held that the said provision laid down a special code to do away with all stages and processes in regular criminal trial¹³. This Court held that once evidence was given on affidavit, the extent and nature of examination of such witness was to be determined by the Court. The object of Section 145(2) was simpler and swifter trial procedure. Only requirement is that the evidence must be admissible and relevant. The affidavit could also prove documents¹⁴. The scheme of Sections 143 to 147 of the Act was a departure from provisions of Cr.P.C. and the Evidence Act and complaints could be tried in a summary manner except where the Magistrate feels that sentence of more than one year may have to be passed. Even in such cases, the procedure to be followed may not be exactly the same as in Cr.P.C. The expression "as far as possible" in Section 143 leaves¹³ Mandvi Cooperative Bank Ltd. v.

Nimesh B. Thakore(2010) 3 SCC 83, paras 25, 26 14 Para 41, ibid sufficient flexibility for the Magistrate so as not to affect the quick flow of the trial process. The trial has to proceed on day to day basis with endeavour to conclude the same within six months. Affidavit of the complainant can be read as evidence. Bank's slip or memo of cheque dishonour can give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved.

10. Again, this Court considered the matter in J.V. Baharuni and Anr. etc. versus State of Gujarat and Anr etc.¹⁵ and observed that the procedure prescribed for cases under Section 138 of the Act was flexible and applicability of Section 326(3) of the Cr.P.C. in not acting on the evidence already recorded in a summary trial did not strictly apply to the scheme of Section 143 of the Act¹⁶. This Court observed that the procedure being followed by the Magistrates was not commensurate with the summary trial provisions and a successor Magistrate ought not to mechanically order de novo trial. This Court observed that the Court should make endeavour to expedite hearing of cases in a time bound manner. The Magistrate should make attempts to encourage compounding of offence at an¹⁵ (2014) 10 SCC 494 16 Para 43 of J.V. Baharuni (2014) 10 SCC 494 early stage of litigation. The compensatory aspect of remedy should be given priority over the punitive aspect¹⁷.

11. While it is true that in Subramaniam Sethuraman versus State of Maharashtra¹⁸ this Court observed that once the plea of the accused is recorded under Section 252 of the Cr.P.C., the procedure contemplated under Chapter XX of the Cr.P.C. has to be followed to take the trial to its logical conclusion, the said judgment was rendered as per statutory provisions prior to 2002

amendment. The statutory scheme post 2002 amendment as considered in *Mandvi Cooperative Bank and J.V. Baharuni* (supra) has brought about a change in law and it needs to be recognised. After 2002 amendment, Section 143 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the Court. Such an interpretation was consistent with the intention of legislature. The court has to balance the rights of the complainant and the accused and also to enhance access to justice. Basic object of the law is to enhance credibility of the cheque transactions by providing speedy remedy to the 17 Para 60 of *J.V. Baharuni* (2014) 10 SCC 494 18 (2004)13 SCC 324 complainant without intending to punish the drawer of the cheque whose conduct is reasonable or where compensation to the complainant meets the ends of justice. Appropriate order can be passed by the Court in exercise of its inherent power under Section 143 of the Act which is different from compounding by consent of parties. Thus, Section 258 Cr.P.C. which enables proceedings to be stopped in a summons case, even though strictly speaking is not applicable to complaint cases, since the provisions of the Cr.P.C. are applicable “so far as may be”, the principle of the said provision is applicable to a complaint case covered by Section 143 of the Act which contemplates applicability of summary trial provisions, as far as possible, i.e. with such deviation as may be necessary for speedy trial in the context.

12. The sentence prescribed under Section 138 of the Act is upto two years or with fine which may extend to twice the amount or with both. What needs to be noted is the fact that power under Section 357(3) Cr.P.C. to direct payment of compensation is in addition to the said prescribed sentence, if sentence of fine is not imposed. The amount of compensation can be fixed having regard to the extent of loss suffered by the action of the accused as assessed by the Court. The direction to pay compensation can be enforced by default sentence under Section 64 IPC and by recovery procedure prescribed under Section 431 Cr.P.C.¹⁹

13. This Court in *Indian Bank Association and Ors. versus Union of India and Ors.*²⁰ approved the directions of the Bombay High Court, Calcutta High Court and Delhi High Court in *KSL and Industries Ltd. v. Mannalal Khandelwal* ²¹, *Indo International Ltd. versus State of Maharashtra*²², *Harishchandra Biyani versus Stock Holding Corporation of India Ltd.* ²³, *Magma Leasing Ltd. versus State of W.B.* ²⁴ and *Rajesh Agarwal versus State*²⁵ laying down simpler procedure for disposal of cases under Section 138 of the Act. This Court directed as follows:

“23. Many of the directions given by the various High Courts, in our view, are worthy of emulation by the criminal courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given:

23.1. The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinise the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

19 Hari Kishan v. Sukhbir Singh (1988) 4 SCC 551; Suganthi Suresh Kumar v. Jagdeeshan (2002) 2 SCC 420; K.A. Abbas H.S.A. v. Sabu Joseph (2010) 6 SCC 230; R. Mohan v. A.K. Vijaya Kumar (2012) 8 SCC 721; and Kumaran v. State of Kerala (2017) 7 SCC 471 20 (2014) 5 SCC 590 21 2005 Cri LJ 1201 (Bom) 22 2006 Cri LJ 208: (2005) 44 Civil CC (Bom) 23 (2006) 4 Mah LJ 381 24 (2007) 3 CHN 574 25 ILR (2010) 6 Del 610 23.2. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice on the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3. The court may indicate in the summons that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4. The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 CrPC to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

23.5. The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses instead of examining them in the court. The witnesses to the complaint and the accused must be available for cross-examination as and when there is direction to this effect by the court.

24. We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the abovementioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. The writ petition is, accordingly, disposed of, as above.”

14. We may, however, note that this Court held that general directions ought not to be issued which may deprive the Magistrate to exercise power under Section 205 Cr.P.C. 26 We need to clarify that the judgment of this Court is not a bar to issue directions which do not affect the exercise of power under Section 205, to require personal attendance wherever necessary. Needless to say that the judgment cannot be read as affecting the power of the High Court under Article 225 of the Constitution read with Articles 227 and 235 to issue directions to subordinate courts without affecting the prevailing statutory scheme.

15. In Bhaskar Industries Ltd. versus Bhiwani Denim & Apparels Ltd.²⁷, this Court considered the issue of hardship caused in personal attendance by an accused particularly where accused is located far away from the jurisdiction of the Court where the complaint is filed. This Court held that even in absence of accused, evidence can be recorded in presence of counsel under Section 273 Cr.P.C. and

Section 317 Cr.P.C. permitted trial to be held in absence of accused. Section 205 Cr.P.C. specifically enabled the Magistrate to dispense with the personal appearance. Having regard to the nature of offence under Section 138, this Court held that the Magistrates ought to consider exercise of the jurisdiction under 26 TGN Kumar v. State of Kerala (2011) 2 SCC 772 27 (2001) 7 SCC 401 Section 205 Cr.P.C. to relieve accused of the hardship without prejudice to the prosecution proceedings. It was observed :

“15. These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.”

16. It is, thus, clear that the trials under Chapter XVII of the Act are expected normally to be summary trial. Once the complaint is filed which is accompanied by the dishonored cheque and the bank's slip and the affidavit, the Court ought to issue summons. The service of summons can be by post/e-mail/courier and ought to be properly monitored. The summons ought to indicate that the accused could make specified payment by deposit in a particular account before the specified date and inform the court and the complainant by e-mail. In such a situation, he may not be required to appear if the court is satisfied that the payment has not been duly made and if the complainant has no valid objection. If the accused is required to appear, his statement ought to be recorded forthwith and the case fixed for defence evidence, unless complainant's witnesses are recalled for examination.

17. Having regard to magnitude of challenge posed by cases filed under Section 138 of the Act, which constitute about 20% of the total number of cases filed in the Courts (as per 213 th Report of the Law Commission) and earlier directions of this Court in this regard, it appears to be necessary that the situation is reviewed by the High Courts and updated directions are issued. Interactions, action plans and monitoring are continuing steps mandated by Articles 39A and 21 of the Constitution to achieve the goal of access to justice 28. Use of modern technology needs to be considered not only for paperless courts but also to reduce overcrowding of courts. There appears to be need to consider categories of cases which can be partly or entirely concluded “online” without physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated. Traffic challans may perhaps be one such category. Atleast some number of Section 138 cases can be decided online. If complaint with affidavits and documents can be filed online, process issued online and accused pays the specified

28 Hussain vs. Union of India (2017)5 SCC 702 amount online, it may obviate the need for personal appearance of the complainant or the accused. Only if the accused contests, need for appearance of parties may arise which may be through counsel and wherever viable, video conferencing can be used. Personal appearances can be dispensed with on suitable self operating conditions. This is a matter to be considered by the High Courts and wherever viable, appropriate directions can be issued.

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 Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. 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 of 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) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one 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 dishonor 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 Cr.P.C. 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 Cr.P.C. 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) Cr.P.C. with sentence of less than one year will not be adequate, having regard to the amount of cheque, conduct of the accused and other circumstances.

20. In every complaint under Section 138 of the Act, it may be desirable that the complainant gives his bank account number and if possible e-mail ID of the accused. If e-mail ID is available with the Bank where the accused has an account, such Bank, on being required, should furnish such e-mail ID to the payee of the cheque. In every summons, issued to the accused, it may be indicated that if the accused deposits the specified amount, which should be assessed by the Court having regard to the cheque amount and interest/cost, by a specified date, the accused need not appear unless required and proceedings may be closed subject to any valid objection of the complainant. If the accused complies with such summons and informs the Court and the complainant by e-mail, the Court can ascertain the objection, if any, of the complainant and close the proceedings unless it becomes necessary to proceed with the case. In such a situation, the accused's presence can be required, unless the presence is otherwise exempted subject to such conditions as may be considered appropriate. The accused, who wants to contest the case, must be required to disclose specific defence for such contest. It is open to the Court to ask specific questions to the accused at that stage. In case the trial is to proceed, it will be open to the Court to explore the possibility of settlement. It will also be open to the Court to consider the provisions of plea bargaining. Subject to this, the trial can be on day to day basis and endeavour must be to conclude it within six months. The guilty must be punished at the earliest as per law and the one who obeys the law need not be held up in proceedings for long unnecessarily.

21. It will be open to the High Courts to consider and lay down category of cases where proceedings or part thereof can be conducted online by designated courts or otherwise. The High Courts may also consider issuing any further updated directions for dealing with Section 138 cases in the light of judgments of this Court.

The appeals are disposed of.

It will be open to the appellants to move the Trial Court afresh for any further order in the light of this judgment.

.....J. [ADARSH KUMAR GOEL]J. [UDAY UMESH
LALIT] NEW DELHI;

OCTOBER 5, 2017.