



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 22150 OF 2023

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M/s. Bajaj Constructions
through its Sole Proprietor Mr. Manish
Bajaj, Age – 44 years, Occupation –
Business, Having office at 101, Shanti
Kuttir, M. G. Road, Kandivali (West),
Mumbai – 400 067

AND

Residing at Flat No.9, Versova Sea
Glimpse CHS Ltd., 51, J. P. Road, Aram
Nagar, Part-2, Versova, Andheri (West),
Mumbai – 400 061.

...Petitioner

Versus

1. The State of Maharashtra
2. M/s. Paint Art, having their office at:
Survey No.59, Khasi Wadi, Gamdevi
Hutment, Indira Nagar, Santacruz
(East), Mumbai – 400 055
3. Shakeel Khan
having office at:
Survey No.9, Khasi Wadi, Gamdevi
Hutment, Indira Nagar, Santacruz
(East), Mumbai – 400 055.

...Respondents

Mr. Niranjan Mundargi a/w Manisha Prajapati, i/b Dhiren
Shah, for the Petitioner.

Mr. Prashant Jadhav, APP for the State/Respondent No.1.

Mr. Sayaji Nangre, for Respondent No.2.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 21st MARCH, 2024
PRONOUNCED ON: 10th JUNE, 2024

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the counsel for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 takes exception to a judgment and order dated 19th August, 2023 passed by the learned Additional Sessions Judge, Greater Bombay, in Criminal Revision Application No.400 of 2023, whereby the learned Additional Sessions Judge allowed the revision setting aside an order passed by the learned Metropolitan Magistrate, 30th Court, Kurla, on 10th April, 2023 rejecting an application (Exhibit-11) for direction to pay interim compensation under Section 143A of the Negotiable Instruments Act, 1881 ("NI Act, 1881"), and direct the petitioner – accused to deposit 20% of the amount of the cheques by way of interim compensation.

3. Shorn of superfluities, the background facts necessary for the determination of this petition can be stated as under:

(a) For the sake of clarity and convenience, parties are hereinafter referred to in the capacity in which they are arrayed before the learned Magistrate in CC No.97/SC/2022.

(b) Mr. Shakeel Khan – respondent No.3 is the Proprietor of M/s. Paint Art – respondent No.1/complainant. M/s. Paint Art is engaged in the business of internal and external painting of building, plumbing and reconstruction work. M/s. Bajaj Construction is the sole proprietary concern of Manish Bajaj – accused No.2. Accused No.2 also deals in the business of building construction and real estate development.

(c) One of the buildings namely; Vandana Building, then being developed by accused was incomplete. At the instance of the accused, the complainant carried out balance civil work of the said building. Accused had agreed to pay consideration of Rs.1,70,00,000/-. Despite execution of the entire work in May, 2019, the accused committed default in payment of the cost of civil work. Eventually, on 7th September, 2021, accused No.2 affirmed an affidavit acknowledging the liability to pay the said amount of Rs.1,70,00,000/- and had drawn four cheques on City Union Bank, Khar (W), payable on 20th October, 2021 for an amount of Rs.42,50,000/- each, aggregating to Rs.1,70,00,000/-, towards discharge of the said liability.

(d) Upon presentment, those cheques were returned unencashed on 27th October, 2021. At the instance of accused No.2, the cheques were again presented on 23rd December, 2021

and they were again returned unencashed on 23rd December, 2021. A demand notice was issued on 7th January, 2023. Despite service of the demand notice, the accused committed default in payment of the amount covered by the cheques. Hence, the complaint for the offence punishable under Section 138 of the NI Act, 1881.

(e) Upon being served with the summons, the accused – petitioner appeared. The complainant filed an application for a direction to the accused to pay interim compensation (Exhibit-11). The accused resisted the application by filing a reply (Exhibit-16) contending, *inter alia*, that a substantial portion of the amount covered by the subject cheques was, in fact, paid to the complainant in cash and through banking channels. Copies of the vouchers evidencing the payment of the amount and extract of the bank accounts were annexed to the reply. It was contended that the complainant had misused the custody of the subject cheques and suppressed the fact that a substantial portion of the amount was already repaid. Resultantly, the presentment of the cheques, without acknowledging the part payment having already received, was illegal and, therefore, the cheques cannot be said to have been drawn in discharge of a legally enforceable debt or liability.

(f) By an order dated 10th April, 2023, the learned Metropolitan Magistrate was persuaded to reject the application opining, *inter alia*, that the accused appeared before the Court on 7th December, 2022 and on the very day the plea of the accused was recorded. Thus, there was no attempt to delay the trial on the part of the accused. Secondly, in the reply, the accused had given a plausible explanation and, thus, there was a probability of rebuttal of presumption of existence of a legally enforceable debt.

(g) Being aggrieved, the complainant preferred a revision application before the learned Sessions Judge, Greater Bombay.

(h) The learned Additional Sessions Judge was of the view that the learned Magistrate failed to exercise the jurisdiction conferred under Section 143A of the NI Act, 1881 in a lawful manner. The factors, which were germane for the determination of the application under Section 143A of the NI Act, 1881 were not kept in view by the learned Magistrate. Since there appeared no dispute regarding the contract between the complainant and accused and issue of the subject cheques, the learned Magistrate ought to have awarded interim compensation. Holding thus, the learned Additional Sessions Judge allowed the revision application and directed the accused

to deposit 20% of the amount covered by the cheque by way of interim compensation, under Section 143A of the NI Act, 1881.

(i) Being aggrieved the accused has invoked the writ jurisdiction of this Court.

4. I have heard Mr. Mundargi, the learned Counsel for the petitioner, Mr. Jadhav, the learned APP for the State – respondent No.1, and Mr. Nangre, the learned Counsel for respondent Nos.2 and 3 – complainant. With the assistance of the learned Counsel for the parties, I have also perused the material on record.

5. Mr. Mundargi, the learned Counsel for the petitioner, submitted that the learned Additional Sessions Judge approached the matter as if the provisions contained in Section 143A of the NI Act, 1881 are mandatory in nature. In the process, the learned Additional Sessions Judge lost sight of the fact that the learned Magistrate had declined to exercise the discretion for justifiable reasons. There was no reason to interfere with a discretionary order passed by the learned Magistrate. Secondly, the learned Additional Sessions Judge did not consider the question of the quantum of interim compensation to be awarded in a correct perspective and mechanically directed the accused to pay by way of interim

compensation 20% of the amount covered by the cheques; the maximum which can be awarded under Section 143A of the NI Act, 1881. To bolster up the submissions that the provisions contained in Section 143A of the NI Act, 1881 are directory in nature and even when the Court comes to a conclusion that interim compensation is required to be awarded, the Court is enjoined to record reasons for determining the quantum of compensation to be so awarded, Mr. Mundargi placed reliance on the decision of a learned Single Judge of this Court in the case of *Ashwin Ashokrao Karokar vs. Laxmikant Govind Joshi*¹ and the judgment of the Supreme Court in the *Rakesh Ranjan Shrivastava vs. State of Jharkhand and another*².

6. Mr. Sayaji Nangre, the learned Counsel for respondent Nos.2 and 3 – complainant, supported the order passed by the learned Additional Sessions Judge. It was urged that the learned Additional Sessions Judge has justifiably corrected the error in exercise of the discretion committed by the learned Metropolitan Magistrate. Laying emphasis on the fact that there was overwhelming material to indicate that the accused had drawn the cheques towards the discharge of the liability, as is evident from the affidavit affirmed by the accused, it was

1 2022 SCC Online Bom 8577.

2 2024 SCC OnLine SC 309.

urged that the learned Additional Sessions Judge correctly exercised the discretion to award interim compensation lest the provisions contained in Section 143A of the NI Act, 1881 would be rendered otiose.

7. Mr. Nangre placed reliance on the decision of the Supreme Court in the case of *Hiten P. Dalal vs. Bratindranath Banerjee*³, to demonstrate the nature of the presumptions envisaged by the provisions contained in Sections 118, 138 and 139 of the NI Act, 1881. In the face of the said presumptions, the learned Magistrate could not have observed that it was probable that the accused could succeed in dispelling the presumptions, urged Mr. Nangre.

8. Section 143A of the NI Act, 1881 came to be inserted by the Negotiable Instruments (Amendment) Act 20 of 2018. It reads as under:

“143A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant—

(a) in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and

(b) in any other case, upon framing of charge.

(2) The interim compensation under sub-section (1) shall not exceed twenty per cent. of the amount of the cheque.

(3) The interim compensation shall be paid within sixty days from the date of the order under sub-section (1),

3 AIR 2001 Supreme Court 3897.

or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the drawer of the cheque.

(4) If the drawer of the cheque is acquitted, the Court shall direct the complainant to repay to the drawer the amount of interim compensation, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

(5) The interim compensation payable under this section may be recovered as if it were a fine under section 421 of the Code of Criminal Procedure, 1973.

(6) The amount of fine imposed under section 138 or the amount of compensation awarded under section 357 of the Code of Criminal Procedure, 1973, shall be reduced by the amount paid or recovered as interim compensation under this section."

9. The statement of the objects and reasons for inserting

Section 143A of the NI Act, 1881 reads as under:

"The Negotiable Instrument Act, 1881 (the Act) was enacted to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques. The said Act has been amended from time to time so as to provide, *inter alia*, speedy disposal of cases relating to the offence of dishonour of cheques. However, the Central Government has been receiving several representations from the public including trading community relating to pendency of cheque dishonour cases. This is because of delay tactics of unscrupulous drawers of dishonoured cheques due to easy filling of appeals and obtaining stay on proceedings. As a result of this, injustice is caused to the payee of a dishonoured cheque who has to spend considerable time and resources in court proceedings to realise the value of the cheque. Such delays compromise the sanctity of cheque transactions.

2. It is proposed to amend the said Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases so as to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy.

3. It is, therefore, proposed to introduce the Negotiable Instruments (Amendment) Bill, 2017 to provide, *inter alia*, for the following, namely:-

(i) to insert a new section 143A in the said Act to provide that the Court trying an offence under section 138 may order the drawer of the cheque to pay interim compensation to the complainant, in a summary trial or a summons case, where he pleads not guilty to the accusation made in the complaint; and in any other case, upon framing of charge. The interim compensation so payable shall be such sum not exceeding twenty per cent, of the amount of the cheque; and

(ii) to insert a new section 148 in the said Act so as to provide that in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty per cent, of the fine or compensation awarded by the trial court.

4. The Bill seeks to achieve the above objectives.”

(emphasis supplied)

10. The Parliament, as is evident, was anxious to address the issue of undue delay in the disposal of the complaints for the offence punishable under Section 138 of the NI Act, 1881. It was experienced that unscrupulous drawers resorted to dilatory tactics to delay the disposal of the complaints under Section 138 of the NI Act, 1881 and thereby cause prejudice to the payee, who was deprived of the amount covered by the cheque. The sanctity of the transaction through cheque was thus eroded. Therefore, as a measure to compensate the payee, the Parliament considered it appropriate to vest power in the Court to award interim compensation awaiting the adjudication of the guilt.

11. Evidently, the text of Section 143A(1) makes it clear that the power to award interim compensation is discretionary as the Parliament as used the word, “may”. The factors which would weigh with the Court in awarding the interim compensation, though not spelled out by the text of the provisions contained in Section 143A yet are not difficult to discern. *Prima facie* compliance of statutory requirement to invoke Section 138 of the NI Act, 1881, *prima facie* merit of the case of the complainant; the nature of the underlying transaction; the nature of the defence, if any, put-forth by the drawer; probability of dispelling the presumptions under Section 118 and 139 of the NI Act, 1881; the circumstances of the case; conduct of the parties and the capacity of the drawer to pay the interim compensation, if awarded, are few of the factors which are germane for the determination of an application for grant of interim compensation under Section 143A of the NI Act, 1881.

12. In the case of ***Ashwin Karokar*** (supra) a learned Single Judge of this Court held that the provisions of Section 143A of the NI Act, 1881 are directory and not mandatory. The observations of the Court in paragraph 43 are material and hence extracted below:

“43. Section 143-A of the N.I. Act, though enacted with an intent to ensure speedy disposal of the proceeding pending

under Section 138 of the N.I. Act, the said intent, insofar as Section 143-A of the N.I. Act is concerned, does not make the provision mandatory, as what is conferred upon the Court by virtue of the said provision is a discretion to direct interim compensation and no right is created in the complainant under it, to demand the entitlement to compensation. Grant of interim compensation, would be at the discretion of the Court, based upon consideration of various factors, such as (a) whether the requirements of Section 138 of the N.I. Act, were fulfilled (b) whether the pleadings disclose the drawing of the presumption (c) whether the proceedings were within limitation and (d) whether prima facie a legal debt or liability was disclosed from the complaint or the notice of demand preceding it, and factors as such [see : *B.R. Upadhyaya and Anant H. Ulahalkar* (supra)].”

(emphasis supplied)

13. The learned Single Judge further held that the Court has to record reasons to determine the quantum of interim compensation, if it comes to the conclusion that interim compensation is required to be awarded in the given circumstances of the case; which can be anywhere up to 20% of the amount covered by the cheques.

14. In the case of *Rakesh Shrivastava* (supra) the Supreme Court considered the question as to whether the provisions contained in Section 143A of the NI Act, 1881 are directory or mandatory. After analysing the provisions of Section 143A and comparing and contrasting the same with Section 148 of the NI Act, 1881, the Supreme Court ruled that the provisions under Section 143A will have to be held as a directory and not mandatory. And the word “may” used in Section 143A, cannot be construed or interpreted as “shall”. Thus, the power under

Sub-section (1) of Section 143A is discretionary. The Supreme Court enunciated as under:

“16. In the case of Section 143A, the power can be exercised even before the accused is held guilty. Sub-section (1) of Section 143A provides for passing a drastic order for payment of interim compensation against the accused in a complaint under Section 138, even before any adjudication is made on the guilt of the accused. The power can be exercised at the threshold even before the evidence is recorded. If the word ‘may’ is interpreted as ‘shall’, it will have drastic consequences as in every complaint under Section 138, the accused will have to pay interim compensation up to 20 per cent of the cheque amount. Such an interpretation will be unjust and contrary to the well-settled concept of fairness and justice. If such an interpretation is made, the provision may expose itself to the vice of manifest arbitrariness. The provision can be held to be violative of Article 14 of the Constitution. In a sense, sub-section (1) of Section 143A provides for penalising an accused even before his guilt is established. Considering the drastic consequences of exercising the power under Section 143A and that also before the finding of the guilt is recorded in the trial, the word “may” used in the provision cannot be construed as “shall”. The provision will have to be held as a directory and not mandatory. Hence, we have no manner of doubt that the word “may” used in Section 143A, cannot be construed or interpreted as “shall”. Therefore, the power under sub-section (1) of Section 143A is discretionary.”

(emphasis supplied)

15. In the said case, the Supreme Court explicated factors to be considered while exercising the discretion under Section 143A. The observations in paragraphs 19 and 22 are material and hence extracted below:

19. When the court deals with an application under Section 143A of the N.I. Act, the Court will have to prima facie evaluate the merits of the case made out by the complainant and the merits of the defence pleaded by the accused in the reply to the application under sub- section (1) of Section 143A. The presumption under Section 139 of the N.I. Act, by itself, is no ground to direct the payment of interim compensation. The reason is that the presumption is rebuttable. The question of applying the presumption will arise at the trial. Only if the complainant makes out a prima

facie case, a direction can be issued to pay interim compensation. At this stage, the fact that the accused is in financial distress can also be a consideration. Even if the Court concludes that a case is made out for grant of interim compensation, the Court will have to apply its mind to the quantum of interim compensation to be granted. Even at this stage, the Court will have to consider various factors such as the nature of the transaction, the relationship, if any, between the accused and the complainant and the paying capacity of the accused. If the defence of the accused is found to be prima facie a plausible defence, the Court may exercise discretion in refusing to grant interim compensation. We may note that the factors required to be considered, which we have set out above, are not exhaustive. There could be several other factors in the facts of a given case, such as, the pendency of a civil suit, etc. While deciding the prayer made under Section 143A, the Court must record brief reasons indicating consideration of all the relevant factors.

.....

22. Subject to what is held earlier, the main conclusions can be summarised as follows:

a. The exercise of power under sub-section (1) of Section 143A is discretionary. The provision is directory and not mandatory. The word “may” used in the provision cannot be construed as “shall.”

b. While deciding the prayer made under Section 143A, the Court must record brief reasons indicating consideration of all relevant factors.

c. The broad parameters for exercising the discretion under Section 143A are as follows:

i. The Court will have to prima facie evaluate the merits of the case made out by the complainant and the merits of the defence pleaded by the accused in the reply to the application. The financial distress of the accused can also be a consideration.

ii. A direction to pay interim compensation can be issued, only if the complainant makes out a prima facie case.

iii. If the defence of the accused is found to be prima facie plausible, the Court may exercise discretion in refusing to grant interim compensation.

iv. If the Court concludes that a case is made out to grant interim compensation, it will also have to apply its mind to the quantum of interim compensation to be granted. While doing so, the Court will have to consider several factors such as the nature of the transaction, the relationship, if any, between the accused and the complainant, etc.

v. There could be several other relevant factors in the peculiar facts of a given case, which cannot be exhaustively stated. The parameters stated above are not exhaustive.”

(emphasis supplied)

16. In the light of the aforesaid exposition of law, a *prima facie* evaluation of the merits of the complainant’s claim and the defence of the accused is warranted to adjudge as to whether a case for grant of interim compensation is made out. In the event the defence of the accused is found to be *prima facie* plausible, the Court may exercise discretion in refusing to grant interim compensation. Furthermore, if the Court finds that interim compensation has to be awarded it is required to pose unto itself the question of appropriate quantum of the interim compensation. 20% of the amount covered by the cheque, which is the upper threshold, cannot be awarded as a matter of course.

17. On the aforesaid touchstone, reverting to the facts of the case, the thrust of the submission on behalf of the complainant was that since there is an affidavit which evidences the issue of cheques, the existence of legally enforceable liability can hardly be contested. Placing reliance on the decision of the Supreme Court in the case of *Hiten Dalal* (supra) Mr. Nangre would urge that since the presumptions contained in Sections 118 and 139

of the NI Act, 1881 are presumptions of law, the award of interim compensation cannot be faulted at.

18. I find it rather difficult to accede to the broad submission sought to be canvassed by Mr. Nangre premised on the presumptions under Sections 118 and 139 of the NI Act, 1881. In fact, in the case of ***Rakesh Shrivastava*** (supra), the Supreme Court enunciated in clear and explicit terms that the presumption under Section 139 of the NI Act, 1881, by itself, is no ground to direct the payment of interim compensation. The reason is that the presumption is rebuttable and the question of application of presumption will arise at the trial. Thus, only when the complainant makes out a *prima facie* case, a direction can be issued to pay an interim compensation.

19. In the case at hand, in the reply to the application, the accused alleged, *inter alia*, that a substantial part of the amount covered by the cheques was paid in cash and the said fact was evidenced by the vouchers. In addition, a sum of Rs.19,09,750/- was paid through the banking channels. The copies of the invoices were annexed to the reply. Likewise, copies of the extracts of the bank accounts were tendered to bolster up the case that a substantial part of the amount covered by the cheques was paid to the complainant.

20. At this stage, the Court has to be on guard as any expression of opinion on the probability of defence may bear upon the trial. However, the learned Magistrate, had on the basis of the material on record opined that the accused had given a plausible explanation to show that the amount, as claimed by the complainant, was not due and thus there was a probability of rebuttal of the presumptions under the NI Act, 1881. In view of the above, the pivotal question would be, whether the said inference can be said to be perverse or so legally infirm as to warrant interference in exercise of revisional jurisdiction?

21. *Prima facie*, the finding of the learned Metropolitan Magistrate does not appear to be based on no material. Copies of the vouchers and the extracts of the bank accounts, allegedly evidencing the payment by the accused to the complainant, were tendered alongwith reply filed by the accused. *Prima facie*, an inference could not have been drawn that defence raised by the accused appeared to be bald and unsubstantiated. Indeed, whether the defence raised by the accused was such as to dislodge the presumptions under NI Act, 1881 would be a matter for adjudication at the trial. However, the existence of adequate

material to make an endeavour to dislodge the presumptions was brought on record.

22. The learned Metropolitan Magistrate was also of the view that the conduct of the accused was not such that an inference of dilatory approach could be drawn against the accused. The facts that upon being served with the summons, the accused appeared before the Court and his plea was recorded on the very day, and the accused made no attempt to prolong the matter, weighed with the learned Magistrate in declining to exercise the discretion to award interim compensation.

23. The learned Additional Sessions Judge was critical of the aforesaid approach of the learned Magistrate. In the view of the learned Additional Sessions Judge, that could not have been considered as a factor for declining to exercise the discretion to award the compensation.

24. In my view, the aspect of dilatory approach of the accused cannot be said to be wholly irrelevant. It is true the mere fact that the accused regularly appeared before the Court and did not attempt to prolong the trial cannot be the sole consideration for declining to exercise discretion to award compensation under Section 143A. However, as noted above, the measure of interim compensation was introduced as the unscrupulous drawers of

dishonored cheques resorted to dilatory tactics to prevent expeditious disposal of the complaint under Section 138 of the NI Act, 1881.

25. In the totality of the circumstances, in my view, the order passed by the learned Metropolitan Magistrate did not suffer from such legal infirmity as to warrant interference in exercise of the revisional jurisdiction. Since the order passed by the learned Metropolitan Magistrate was discretionary in nature, it was not open to the revisional Court to lightly interfere with the exercise of discretion by the Magistrate, unless it appeared that the discretion was exercised in an arbitrary manner by either ignoring the relevant material or taking into account irrelevant material. Nor could the revisional jurisdiction have been exercised only for the reason that on the same set of facts a different view was possible.

26. The second ground of challenge to the impugned order on the premise that the learned Additional Sessions Judge did not advert to the question of quantum of compensation while awarding interim compensation under Section 143A of the NI Act, 1881 appears to be well-merited. The impugned order singularly lacks any consideration as regards the determination of quantum of compensation.

27. As noted above, in the case of *Rakesh Shrivastava* (supra) the Supreme Court has enunciated in clear and explicit terms that even if the Court concludes that a case is made out for grant of interim compensation, the Court will have to apply its mind to the quantum of interim compensation, to be awarded. Impugned order is conspicuously silent on the said aspect of quantum of interim compensation. I am, therefore, inclined to hold that the impugned order deserves to be interfered with on the said count as well.

28. The conspectus of aforesaid consideration is that the petition deserves to be allowed.

29. Hence, the following order:

: O R D E R :

- (i) Writ petition stands allowed.
- (ii) The judgment and order passed by the learned Additional Sessions Judge stands quashed and set aside.
- (iii) Order passed by the learned Metropolitan Magistrate dated 10th April, 2023 stands restored.
- (iv) Application for interim compensation (Exhibit-11) in CC No.97/SC/2022 stands rejected.

- (v) By way of abundant caution, it is clarified that the observations made hereinabove are confined to the determination of entitlement of interim compensation under Section 143A of the NI Act, 1881 and they shall not be construed as an expression of opinion on the guilt or otherwise of the accused, and the trial Court shall not be influenced by any of the observations while deciding CC No.97/SC/2022.

Rule made absolute in the aforesaid terms.

No costs.

[N. J. JAMADAR, J.]