IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CrMP No. 508 of 2023 in Cr. Revision No. 332 of 2021
Decided on: March 1, 2023

Naresh Kumar ……..Petitioner

Versus

Trilok Chand ….Respondent

Coram:
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? [1]Yes.

For the Petitioner : Mr. Ravinder Singh Chandel, Advocate.

For the Respondent : Mr. Kulbhushan Khajuria, Advocate.

Sandeep Sharma, Judge (oral):

By way of instant application filed under S.482 CrPC, prayer has been made on behalf of the applicant/accused for compounding of the offence under S.147 of the Negotiable Instruments Act (hereinafter, 'Act'). No reply is intended to be filed on behalf of the Learned Counsel appearing for the non-applicant.

2. Precisely, the facts of the case, as emerge from the record, are that the respondent/complainant (hereafter, 'complainant') instituted complaint under S.138 of the Act against the accused in the competent court of law alleging therein that the accused issued cheque bearing 283466 dated 25.8.2016 (Ex. CW-1/B) amounting to Rs.80,000/- in his favour drawn at UCO Bank, Jubbal, District Shimla, however, fact remains that the aforesaid cheque was dishonored on account insufficient funds in the account of the accused vide memo dated

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

17.11.2016, and resultantly, the complainant instituted proceedings under S.138 of the Act in the competent Court of law. Learned trial Court on the basis of evidence adduced on record by parties, held accused guilty of having committed offence punishable under S.138 of the Act and convicted and sentenced him to undergo simple imprisonment for six months and to pay compensation to the tune of Rs.1.20 Lakh to the complainant. Accused filed appeal but the same was also dismissed, after which he approached this court under Ss. 397 and 401 CrPC by way of Cr. Revision No. 332 of 2021, but the same was also dismissed on merit vide order dated 10.11.2022.

3. After passing of order dated 10.11.2022, accused compromised the matter with the respondent, whereby he has paid Rs.50,000/- in cash to the learned counsel for the respondent and qua Rs. 70,000/- deposited with learned trial Court, accused has no objection, in case said amount is released in favour of the respondent. On account of aforesaid settlement, accused has approached this court in the instant application filed under S.482 CrPC, praying therein for compounding of the offence under S.147 of the Act. Learned counsel for the non-applicant fairly states that since entire amount of compensation has been deposited by the accused, respondent shall have no objection in case prayer of the accused for compounding of the offence and thereafter his acquittal is accepted.

4. The question which requires consideration in the instant application is that, whether after upholding the judgments of conviction

and order of sentence passed by learned courts below, this court can proceed to compound the offence or not?

5. This court vide judgment passed in CrMP No. 1197 of 2017 in Cr. Revision No. 394 of 2015 titled **Gulab Singh** v. **Vidya Sagar Sharma**, while relying upon judgment of Hon'ble Apex Court as well as other Constitutional Courts has already held that court, while exercising power under S.147 of Act can proceed to compound offence even in those cases, where accused stands convicted. Relevant portion of the order passed by this court in order supra is reproduced as under:

> "8. Before acceding to aforesaid joint request having been made by learned counsel for the respective parties, moot question arise for determination of this Court is whether it has power to review/recall its own order/judgment passed in Criminal Revision No.394 of 2015, wherein judgment of conviction recorded by both the Courts below came to be upheld.
>
> 9. Mr. Manohar Lal Sharma, learned counsel representing the petitioner, has invited attention of this Court to the judgment passed by Hon'ble High Court of Rajasthan in Naresh Kumar Sharma versus State of Rajasthan & another, Criminal Misc. Application No.371 of 2016 in Criminal Revision Petition No.1267 of 2016, to suggests that in view of amicable settlement arrived inter se the parties, this Court has power to recall its judgment in the light of the provisions contained in Section 147 of the Act, which permits compounding of the offence under Section 138 of the Act. At this stage, it would be profitable to reproduce the judgment passed by Hon'ble High Court of Rajasthan hereinbelow:-
>
> > "The accused-petitioner has field this criminal misc. application under section 482 Cr.P.C read with section 147 of Negotiable Instruments Act(for short the 'Act') with a prayer to review/recall the order dated 6.10.2016 passed by this Court in SB Criminal Revision Petition No.1267/2016 in the light of compromise dated 4.11.2016 subsequently entered between the parties and as a consequences thereof to acquit the accused petitioner for the offence under Section 138 of N.I. Act.
> >
> > Vide order dated 6.10.2016, the aforesaid revision petition filed by the petitioner was dismissed by this Court while upholding and affirming the judgment and order of conviction and sentence passed by the trial Court as well as by the Appellate Court. It was jointly submitted by the learned counsel for the parties that after the order

dated 6.10.2016 the parties have amicably settled their dispute and entered into compromise and the amount in the dispute has been paid by the petitioner to the respondent-complainant.

It was further submitted that although the revision petition has been dismissed by this Court on merits vide order dated 6.10.2016, but even then that order can be recalled in the light of provisions of Section 147 of N.I.Act which permits compound of the offence under Section 138 of the Act at any stage and the accused can be acquitted.

In support of their submissions, they relied upon the case of K. Subramanian Vs. R.Rajathi reported in (2010) 15 SCC 352 and order dated 7.7.2015 passed by a Single Bench of Hon'ble Gujarat High Court in S.B. Criminal Misc. Application (Recall) No.10232/2015 filed in Special Criminal Application No.3026/2014.

On consideration of submissions jointly made on behalf of the respective parties and the material including the compromise entered into between the parties and the fact that the amount in dispute has been paid by the accused-petitioner to the respondent- complainant and the principles of law laid down in the aforesaid decisions, I find it a fit case in the criminal misc. application is to be allowed and the order dated 6.10.2016 is to be recalled.

Consequently, the criminal misc. application is allowed and the order dated 6.10.2016 is recalled and all the orders whereby the accused-petitioner was convicted and sentenced for the offence under Section 138 of N.I. Act are set aside and as a consequence thereof he is acquitted therefrom."

10. Reliance is also placed upon the judgment passed by Hon'ble Gujarat High Court, wherein similar application came to be filed for recalling the judgment passed by the Hon'ble High Court of Gujarat. In the aforesaid judgment, Hon'ble Gujarat High Court, has reiterated that judgment passed by the High Court affirming the judgment of conviction recorded under Section 138 of the Act, can be recalled in view of the specific provisions contained in Section 147 of the Act, which provides for compounding of offence allegedly committed under Section 138 of the Act.

11. The Hon'ble Apex Court in K. Subramanian Vs. R.Rajathi; (2010)15 Supreme Court Cases 352, also in similar situation ordered for compounding of offence after recording of conviction by the courts below, wherein it has been held as under:-

"6. Thereafter a compromise was entered into and the petitioner claims that he has paid Rs. 4,52,289 to the respondent. In support of this claim, the petitioner has produced an affidavit sworn by him on 1.12.2008. The petitioner has also produced an affidavit sworn by P. Kaliappan, Power of attorney holder of R. Rajathi on 1.12.2008

> mentioning that he has received a sum of Rs. 4,52,289 due under the dishonoured cheques in full discharge of the value of cheques and he is not willing to prosecute the petitioner.
>
> 7. The learned counsel for the petitioner states at the Bar that the petitioner was arrested on 30.7.2008 and has undergone the sentence imposed on him by the trial Court and confirmed by the Sessions Court, the High Court as well as by this Court. The two affidavits sought to be produced by the petitioner as additional documents would indicate that indeed a compromise has taken place between the petitioner and the respondent and the respondent has accepted the compromise offered by the petitioner pursuant to which he has received a sum of Rs.4,52,289. In the affidavit filed by the respondent a prayer is made to permit the petitioner to compound the offence and close the proceedings.
>
> 8. Having regard to the salutary provisions of Section 147 of the Negotiable Instruments Act read with Section 320 of the Code of Criminal Procedure, this Court is of the opinion that in view of the compromise arrived at between the parties, the petitioner should be permitted to compound the offence committed by him under Section 138 of the Code."

12. The Hon'ble Apex Court in the aforesaid judgment has categorically held that in view of the provisions contained under Section 147 of the Act, read with Section 320 of Cr.P.C, compromise arrived inter se the parties, can be accepted and offence committed under Section 138 of the Act, can be ordered to be compounded.

13. Another question which arise for determination/ adjudication of this Court is with regard to maintainability of present review petition. Admittedly, instant review petition has been filed after withdrawal of Special Leave Petition, preferred by the applicant/ petitioner against the judgment passed by this Court in Criminal Revision No.394 of 2015, wherein conviction/ sentence awarded by the Court below came to be upheld. In the case at hand, Special Leave to Appeal (Crl.) filed by the applicant/petitioner was dismissed as withdrawn vide order dated 18.08.2017. Subsequent to passing of aforesaid order by Hon'ble Apex Court, petitioner/applicant has approached this Court, praying therein for modification/recalling of its judgment dated 10.3.2017, passed in Criminal Revision No.394 of 2015 on the ground that parties have amicably settled the matter and entire amount stands paid to the respondent/complainant in terms of judgment passed by the learned trial Court. Learned counsel representing the petitioner/applicant, contended that once the Supreme Court permits withdrawal of a Special Leave Petition without recording reasons, it is as if no appeal was ever filed or entertained, since in the absence of grant of special leave, there is no appeal in existence. Learned counsel further contended that where a Special Leave Petition is

permitted to be withdrawn and equally when it is dismissed in limine without recording reasons, the High Court judgment neither merges into any proceedings before the Supreme Court nor is it in any manner affected by the filing and subsequent withdrawal or dismissal of the Special Leave Petition. In support of aforesaid contentions, learned counsel representing the applicant/ petitioner also invited attention of this Court to the judgment passed by the three Judges Bench of the Supreme Court in Kunhayammed Vs. State of Keral (2000) 6 SCC 359, wherein it has been held that after dismissal of SLP in limine, review petition can be filed because at the stage of dismissal of SLP, there exists no appeal in the eyes of law.

14. Before ascertaining the correctness of aforesaid submissions having been made by learned counsel representing the applicant/petitioner, it would be profitable to take note of judgment passed by Hon'ble Delhi High Court in **Kanoria Industries Limited & ors**. Versus **Union of India & Ors** on 27th February, 2017, wherein it has been held as under:-

> "8. We are in the factual situation of the present case concerned not with a case of dismissal in limine by a non-speaking order of an SLP preferred against the judgment of which review is sought but with dismissal as withdrawn of the SLP. Though the review petitioners, while seeking to withdraw the SLP also sought liberty to move this Court in review petition but the Supreme Court merely dismissed the SLP as withdrawn and has not stated that the liberty sought had been granted.
>
> 9. The question which arises is, whether the dismissal as withdrawn of the SLP, even in the absence of the words "with liberty sought" is to be read as grant of liberty.
>
> 10. The review petitioners obviously were of the opinion that without the aforesaid words, they did not have liberty to approach this Court by way of review and claim to have made an application to the Supreme Court in this regard but which application is stated to have been refused to be listed.
>
> 11. In our opinion, it is not for us to venture into, whether the order, notwithstanding having not provided that the review petitioners had been granted liberty, grants liberty or not. It cannot be lost sight of that it is not as if the counsel for the review petitioners, when the SLP came up before the Court, stated that the filing of SLP was misconceived and withdrew the same. The order records that it was "after some arguments" that the counsel for the review petitioners sought permission to withdraw the SLP. It is also not as if the Supreme Court is not known to, while dismissing the SLP as withdrawn, grant such liberty. The order thus has to be read as it is i.e., of dismissal of SLP as withdrawn.
>
> 12. Rule 9 of Order XV titled "Petitions Generally" of the Supreme Court Rules, 2013 provides for withdrawal of the petition. Once a proceeding / petition is permitted to be withdrawn, the effect of such

withdrawal is as if, it had not been preferred. It is a different matter that the Rules may prohibit the petitioner who so withdraws his petition from re-filing the same or even in the absence of such Rules, such re-filing may be treated as an abuse of the process or by way of re-litigation. But in law a dismissal of the petition as withdrawn cannot be at par with the dismissal of the petition.

13. Neither counsel has however addressed us on this aspect and has proceeded on the premise as if dismissal as withdrawn is the same as dismissal of the petition.

14. As far as the effects, if any, of dismissal in limine of a SLP on a subsequent review petition before the High Court is concerned, which arise for consideration are firstly whether, Abbai Maligai Partnership Firm and Kunhayammed (supra), both of three Judges Bench hold differently and secondly whether the two deal with different factual situations i.e. of a review having been preferred before the dismissal of SLP or after the dismissal of SLP. We have studied the two judgments in this light.

15. We find that in Kunhayammed (supra) the review petition was filed after the dismissal of SLP. The Supreme Court was approached aggrieved from the order of the High Court overruling the preliminary objection as to the maintainability of the review petition on the ground of the SLP having been dismissed. Supreme Court held that where the judgment of the High Court has come up to the Supreme Court by SLP and the SLP is dismissed, the judgment of the High Court does not merge in the order of dismissal of SLP and the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it; it may be that the review Court may interfere or it may not interfere depending upon the law and principles applicable to interference in review; but the High Court, if it exercises a power of review or deals with the review application on merits, cannot be said to be wrong in exercising statutory jurisdiction or power vested in it. It was expressly held that review can be filed even after SLP is dismissed and as also before special leave is granted but not after it is granted. It was held that once special leave is granted, the jurisdiction to consider the validity of the High Court's order vested in the Supreme Court and the High Court cannot entertain a review thereafter unless such a review application was preferred in the High Court before the SLP was granted. With respect to Abbai Maligai Partnership Firm (supra) it was observed that the facts and circumstances of the case persuaded the Supreme Court to form an opinion that the tenants were abusing the process of the Court by approaching the High Court and the very entertainment of review petition and then reversing the earlier order was an affront of the order of the Supreme Court. It was explained that the three Judges Bench in Abbai Maligai Partnership Firm (supra) nowhere in the course of judgment relied on the doctrine of merger for taking the view they had taken and rather a careful reading of Abbai Maligai Partnership Firm (supra) also fortified the view taken in Kunhayammed (supra).

16. It would thus be seen that Kunhayammed (supra), though of a Bench of the same strength as Abbai Maligai Partnership Firm (supra), did not read Abbai Maligai Partnership Firm (supra) as laying down anything to the contrary than what was held in Kunhayammed (supra). The Supreme Court having expressly held so, it is not open

today to the respondent UOI to contend or for us to hold that there is a conflict in the two.

17. We now proceed to analyze whether Sunil Kumar (supra) carves out any different factual scenario in which Abbai Maligai Partnership Firm and Kunhayammed (supra) operate.

18. Supreme Court in Sunil Kumar (supra) was concerned with a petitioner who was held to be a blackmarketer exploiting helplessness of the poor people of the society and capable of engaging lawyers and found to be abusing the process of the Court and wanting to use the Courts as a safe haven. The subject matter of Sunil Kumar (supra) was a transaction under Section 7 of the Essential Commodities Act, 1955. The petitioner therein was found to have approached the High Court for modifying the order of his conviction after the SLP against the order of conviction had been dismissed and had again preferred the SLP to the Supreme Court against the order of the High Court refusing to modify the order of conviction. It was held that Section 362 of the Code of Criminal Procedure, 1973 puts a complete embargo on the Criminal Court to reconsider after the delivery of judgment as the Court becomes functus officio. In this background when the petitioner relied on Kunhayammed (supra), it was observed that Kunhayammed (supra) has been explained in various subsequent judgments as holding that review petition filed before the High Court after approaching the Supreme Court amounts to abuse of the process of the Court. Reference in this regard was made to Meghmala (supra). However, after holding so, it was further held that the ratio of Kunhayammed (supra) has no application to Sunil Kumar (supra) as Kunhayammed (supra) was dealing with civil cases.

19. We have already noticed above that in Kunhayammed (supra) the review petition was filed after the order of dismissal of the SLP.

20. What we find is that the observations, of preferring review petition after the dismissal of SLP amounting to abuse of the process of the Court, in Abbai Maligai Partnership Firm (supra) as well as in Sunil Kumar (supra) are on a factual finding of the petitioners therein abusing the process of the Court and not on the maintainability of the review petition. Certainly, if we are to find the review petitioners herein also to be abusing the process of the Court by preferring this review petition after withdrawal of the SLP preferred against the judgment of which review is sought, the review petition of the review petitioners would also suffer the same fate. However it would not make the review not maintainable."

15. Reliance is also placed upon the judgment passed by Hon'ble Apex Court in **Kunha Yammed and others** versus **State of Kerala and others**; (2000) 6 Supreme Court Cases 359, wherein it has been held as under:-

> "22. We may refer to a recent decision, by Two-Judges Bench, of this Court in V.M. Salgaocar & Bros. Pvt. Ltd. Vs. Commissioner of Income Tax 2000 (3) Scale 240, holding that when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under Article 136 of the

> Constitution. That certainly could not be so when appeal is dismissed though by a nonspeaking order. Here the doctrine of merger applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.
>
> 27.A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

16. It is quite apparent from the aforesaid exposition of law laid down by the Hon'ble Apex Court that doctrine of merger does not apply in the case of dismissal of special leave petition. In the case at hand, special leave to appeal having been filed by the petitioner/applicant has been dismissed as

withdrawn by non-speaking order and as such, does not result in the merger of impugned order in the order of the Hon'ble Supreme Court.

17. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, this Court holds that review petition filed after dismissal of Special Leave Petition, praying therein for recalling/modification of judgment dated 10.3.2017, passed by this Court in Criminal Revision No.394 of 2015, is maintainable and as such, parties are permitted to get the matter compounded in the light of the compromise arrived inter se them. Accordingly, judgment of conviction and sentence recorded by the learned trial court is quashed and set-aside and petitioner is acquitted of the charge framed against him. His bail bonds are discharged. Since, respondent/complainant is/was unnecessarily dragged into litigation for realization of his own money, this Court deems it fit to direct the petitioner/accused to pay an amount of `50,000/- to the respondent/complainant in addition of the amount already paid. At this stage, it may be noticed that learned counsel representing the petitioner has handed over the demand draft of `50,000/- to the complainant in the Court towards litigation charges. Needless to say, amount lying deposited with the learned trial Court shall be released forthwith in favour of the respondent/complainant on his making formal application."

6. It has been categorically concluded in the aforesaid judgment passed by this Court that court can proceed to compound the offence punishable under S.138 of the Act, after recording of conviction and sentence. No doubt, in the case at hand, judgment of conviction and order of sentence recorded by learned trial Court has been further upheld by this Court but since S.147 of the Act coupled with the guidelines laid down in **Damodar S. Prabhu v**. S**ayed Babalal H.** (2010) 5 SCC 663, empowers this Court to compound the offence after recording of conviction, there appears to be no impediment in accepting the prayer made in the application. Moreover, parties have compromised the matter and respondent-complainant is no more

interested in sending the accused behind the bars in terms of judgment of conviction and order of sentence recorded by learned Courts below.

7. Consequently in view of aforesaid, this court finds no impediment in accepting the prayer made on behalf of the applicant through instant application for compounding of the offence and same is allowed. Order dated 10.11.2022 passed in Cr. Revision No. 332 of 2021 is recalled. Matter is ordered to be compounded inter se parties. Impugned judgments of conviction and order of sentence passed by both the learned Courts below are quashed and set aside. Accused is acquitted of the offence punishable under S.138 of the Act. Amount of Rs.70,000/- deposited with learned trial Court is ordered to be released in favour of the respondent, on his making a formal application in this behalf.

8. Since the accused is lodged in Model Central Jail, Kanda, Shimla, Registry is directed to prepare and send the release warrants of the accused to the Superintendent of Jail, Kanda, forthwith, through email.

9. Application stands disposed of in the aforesaid terms.

(Sandeep Sharma)
Judge

March 1, 2023
(vikrant)