HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Misc(Pet.) No. 189/2022

G.k. Construction Company, Through Its Owner Govind Katariya

----Petitioner

Versus

Balaji Makan Samagri Stores, Through Its Proprietor Mallaram Patel,

----Respondent

For Petitioner(s) : Mr. Dinesh Vishnoi

JUSTICE DINESH MEHTA

Order

04/03/2022

Reportable

1. By way of the present petition filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the "Code"), the petitioner has challenged the order dated 08.11.2021 passed by Additional Sessions Judge, Bilara, District Jodhpur (hereinafter referred to as the "Appellate Court") whereby the Appellate Court while allowing the application of the petitioner for suspension of sentence has directed the petitioner to deposit 20% of the fine amount (Rs.2,65,800/- out of Rs.13,29,000/-).

2. The said order also required the petitioner to furnish a bail bond of Rs.30,000/- in an appeal that was filed by the petitioner against his conviction under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the "Act").

3. Learned counsel for the petitioner argued that the Appellate Court was not justified in requiring the petitioner to deposit 20%

of the fine amount, because, putting such a condition has taken away petitioner's right of liberty.

4. In support of his contention aforesaid, learned counsel for the petitioner relied upon the judgment of Hon'ble the Supreme Court dated 19.01.2021 in the case of ***Dilip Singh vs. State of Madhya Pradesh & Anr.*** *(Cr. Appeal No. 53 of 2021 arising out of SLP (Crl) No. 10484/2019)*.

5. It was also argued by learned counsel for the petitioner that Section 148 of the Act uses the expression "may" and, therefore, the learned Appellate Court was not justified in imposing such an onerous condition particularly when the amount of fine was exorbitant and there was a discretion with the Appellate Court to not direct the petitioner to deposit such amount.

6. Heard.

7. Before delving upon the merits of the case, it would be appropriate to advert to the relevant statutory provisions involved in the present case, namely, section 148 of the Act and section 374(3) of the Code.

Section 148 of the Act reads thus:

> "**148. Power of Appellate Court to order payment pending appeal against conviction**.-
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), 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:
> Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.
> (2) The amount referred to in sub-section (1) shall be deposited 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 appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:
Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, 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."

Section 374(3) of the Code reads thus:

"**374. Appeals from convictions**.—
(3) Save as otherwise provided in sub-section (2), any person,—(a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or
(b) sentenced under section 325, or
(c) in respect of whom an order has been made or a sentence has been passed under section 360 by any Magistrate,
may appeal to the Court of Session."

8. It would also be relevant to briefly refer to the objects and reasons of section 148 which was brought into force by the Act No. 20 of 2018 w.e.f. 01.09.2018. The relevant part of objects and reasons spelt out for the corresponding *Negotiable Instruments (Amendment) Bill, 2017* reads thus:

> "(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."

9. It is pertinent to note that the provision giving a remedy of appeal, being section 374(3) of the Code, does not envisage any such condition as that contained in section 148 of the Act for an appeal. When a person prefers an appeal against a conviction under section 138 of the Act, section 148 of the Act enjoins upon the Court, to order deposition of minimum 20% of the amount of

fine awarded due to the non-obstante clause in section 148, which gives it an overriding effect over the provisions of the Code in so far as they are inconsistent with section 148 of the Act. Hence, though section 374(3) of the Code does not provide any condition of payment of the fine or compensation, but by virtue of section 148 of the Act it would have to be deposited.

10. The core question whether the usage of word 'may' in section 148 provides a discretion to the Court to impose or not to impose the condition of depositing minimum 20% of the fine amount, is required to be dilated upon at some length.

11. It is a settled position of law that a statute does not take a mandatory or directory character merely by virtue of the words 'shall' or 'may'. For determining whether the provision is directory or mandatory it must first be ascertained whether by contriving it discretionary or mandatory, the object which the statute wanted to achieve as envisaged by the legislature in the statement of objects and reasons is achieved or not.

12. Dealing with the issue of 'may' versus 'shall', Hon'ble the Supreme Court in the case of ***Bachahan Devi & Ors. Vs. Nagar Nigam, Gorakhpur & Ors*** reported in *AIR 2008 SC 1282* has held thus :

> *31. It is well-settled that the use of word `may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word `may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word `may', the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages*

sought to be achieved by the use of this word, and the like. It is equally well-settled that where the word `may' involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word `may' should be interpreted to convey a mandatory force.

As a general rule, the word `may' is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word 'shall', which ordinarily is imperative as it imposes a duty. Cases however, are not wanting where the words `may' `shall', and `must' are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances.

The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word `shall' or `may' depends on conferment of power. Depending upon the context, 'may' does not always mean may. 'May' is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes his duty to exercise that power. Where the language of statute creates a duty, the special remedy is prescribed for non-performance of the duty.

32. If it appears to be the settled intention of the legislature to convey the sense of compulsion, as where an obligation is created, the use of the word 'may' will not prevent the court from giving it the effect of

Compulsion or obligation. Where the statute was passed purely in public interest and that rights of private citizens have been considerably modified and curtailed in the interests of the general development of an area or in the interests or removal of slums and unsanitary areas. Though the power is conferred upon the statutory body by the use of the word 'may' that power must be construed as a statutory duty. Conversely, the use of the term 'shall' may indicate the use in optional or permissive sense. Although in general sense 'may' is enabling or discretional and `shall' is obligatory, the connotation is not inelastic and inviolate." Where to interpret the word `may' as directory would render the very object of the Act as nugatory, the word 'may' must mean 'shall'.

33. The ultimate rule in construing auxiliary verbs like `may' and `shall' is to discover the legislative intent; and the use of words `may' and 'shall' is not decisive of its discretion or mandates. The use of the words `may' and `shall' may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed."

13. In another judgment (***The Official Liquidator vs. Dharti Dhan (P) Ltd.*** reported in *AIR 1977 SC 740)*, Hon'ble the Supreme Court has held thus:

*"**10.** The principle laid down above has been followed consistently by this Court whenever it has been contended that the word "may" carries with it the obligation to exercise a power in a particular manner of direction. In such a case, it is always the purpose of the power which has to be examined in order to determine*

the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfilment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner. This is the principle we deduce from the cases of this Court cited before us: Bhaiya Punjalal Bhugwandin v. Dare Bhagwatprasad Prabhuprasad, MANU/SC/0372/1962 : [1963]3SCR312 State of Uttar Pradesh v. Jogendra Singh, MANU/SC/0221/1963 : (1963)IILLJ444SC Sardar Govindrao and Ors. v. State of M.P. MANU/SC/0014/1964 : [1965]1SCR678 Shri A.C. Aggarwal, sub-Divisional Magistrate, Delhi and Anr. v. Smt. Ram Kali etc. MANU/SC/0079/1967 : 1968CriLJ82 Bashira v. State of U.P. : [1969]1SCR32 and Prakash Chand Agarwal and Ors. v. Hindustan Sled Ltd.1972 1 SCR 405."

14. Similarly, in its judgment rendered in the case of State of ***Uttar Pradesh vs. Jogendra Singh*** reported in *AIR 1963 SC 1618,* Hon'ble the Apex Court held as follows:

*"**9**. Rule 4(2) deals with the class of gazetted government servants and gives them the right to make a request to the Governor that their cases should be referred to the Tribunal in respect of matters specified in clauses (a) to (d) of sub-rule (1). The question for our decision is whether like the word "may" in rule 4(1) which confers the discretion on the Governor, the word "may" in sub-rule (2) confers discretion on him, or does*

the word "may" in sub-rule (2) really mean "shall" or "must" ? There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well-settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed."

15. The expression 'may' used in section 148 of the Act at first glance gives an impression that it gives a leeway/discretion to the Appellate Court to direct/not direct the appellant to deposit part of the amount of fine during pendency of appeal. Had the intention of the legislature been to give the discretion to not ask the convict to deposit any sum then, there was no reason to prescribe a minimum limit of 20% of fine amount.

16. Both the words 'may' and 'shall' are 'modal auxiliary verbs' according to English grammar. 'May' generally indicates discretion whereas 'shall' used in a statute generally makes the provision mandatory. If the provisions of section 148 of the Act are carefully examined, it transpires that the expression 'may' is followed by "sum which shall be minimum of twenty percent of the fine amount." If the word 'may' used in section 148 of the Act is construed to be conferring discretion then, the latter part of the provision (sum which shall be minimum of twenty percent of the fine amount) will become redundant.

17. In other words, if section 148 is regarded to be discretionary, to the effect that the Court may do away with the deposit, then, the Court would render defunct the very requirement of deposit pendente lite appeal. Because as per section 148 of the Act, such amount cannot be less than 20% of the fine amount and any other percentage of amount (being less than 20%) would be in direct contravention of the express provision which postulates that minimum of 20% of fine amount has to be deposited. If at all any discretion exists, then, the same is for directing the deposit to be between 20% to 100% of the fine amount and not between 0%-20% or not issuing any direction to deposit at all. Because not directing any amount to be deposited would be tantamount to depositing 0% of the fine amount and the same being less than 20% of the fine amount is impermissible as per the mandate of section 148 of the Act. Had the legislature intended to make the exercise of power under section 148 discretionary, it would not have imposed the duty upon the Court to direct deposit of a minimum 20% of fine amount.

18. Similarly if the term 'shall' is followed by a provision/words providing for maximum limit/cap then, the Court/Authority can direct to not deposit any amount (0% of the fine amount), because, the leeway is between 0% to maximum percentage. Hence, in spite of the usage of word 'shall' it will be a discretion available with the Court/Authority to not require the appellant to deposit any amount.

19. In the opinion of this Court, if modal auxiliary verbs or imperative words such as 'may', 'should' etc. are followed by the provision/expression prescribing lower bar/limit such as 'minimum', 'not below', etc. then, these words ('may', 'should',

etc.) are required to be read as 'shall'. Similarly, if the word 'shall' is followed by provision/words providing upper cap/upper limit by usage of words 'maximum' or 'not above', etc. then, the expression 'may' or 'shall' confer the discretion upon the Court/Authorities and hence, the words 'may' or 'shall' would be read as 'may'.

20. In light of the discussion foregoing, a purposive interpretation of section 148 of the Act is necessary and the same would warrant that the expression 'may' as contained in section 148 of the Act be read as 'shall'. Read this way, the provision would mean that the Court 'shall' order the convict to pay minimum of 20% amount of fine in an appeal against conviction under section 138 of the Act and resultantly, the plight of the drawee would be eased (as intended by the legislature while enacting section 148 of the Act) which otherwise would have been aggravated due to prolonged judicial proceedings.

21. Most importantly, in ***Surinder Singh Deswal vs. Virender Gandhi*** reported in *(2019) 11 SCC 341,* Hon'ble the Supreme Court while dealing with the interpretation of the word 'may' in section 148(1) of the Act has held thus:

> *"**9**. Now so far as the submission on behalf of the Appellants that even considering the language used in Section 148 of the N.I. Act as amended, the appellate Court "may" order the Appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial Court and the word used is not "shall" and therefore the discretion is vested with the first appellate court to direct the Appellant - Accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the Appellants would be contrary to the provisions of Section 148 of the N.I. Act as amended is concerned, considering the amended Section 148 of the N.I. Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the N.I. Act, though it is true that in*

amended Section 148 of the N.I. Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the N.I. Act confers power upon the Appellate Court to pass an order pending appeal to direct the Appellant-Accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the Appellant-Accused Under Section 389 of the Code of Criminal Procedure to suspend the sentence. The aforesaid is required to be construed considering the fact that as per the amended Section 148 of the N.I. Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the Appellant. Therefore, if amended Section 148 of the N.I. Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the N.I. Act, but also Section 138 of the N.I. Act. Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonoured of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, the Parliament has thought it fit to amend Section 148 of the N.I. Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the N.I. Act and also Section 138 of the N.I. Act."

22. Hence, the issue is no more res-integra. In so far as petitioner's reliance on the judgment rendered in the case of *Dilip Singh* (supra) is concerned, in the said case while deciding the validity of the Court's decision to compel the applicant to deposit Rs. 41 lacs for grant of pre-arrest bail, Hon'ble the Supreme Court held that ex-facie the dispute in the case is civil in nature involving a consideration of Rs. 41 lacs paid in relation to an agreement to

sell. Hence, "*By imposing the condition of deposit of Rs. 41 lakhs, the High Court has, in an application for pre-arrest bail under Section 438 of the Criminal Procedure Code, virtually issued directions in the nature of recovery in a civil suit.*"

23. Per contra, in the present case the dispute is civil in nature with criminal overtones and unlike section 438 of the Code, there exists a specific statutory requirement under section 148 of the Act for a deposit of minimum 20% of the fine amount during pendency of an appeal against conviction under section 138 of the Act. Petitioner's reliance on the case of *Dilip Singh (supra)* is therefore, absolutely misconceived.

24. As a result of the discussion foregoing, this Court does not find any error or infirmity in the impugned order dated 08.11.2021.

25. The misc. petition, therefore, fails.

26. Having regard to the fact that the petitioner preferred the present petition on 06.01.2022 and the same remained pending consideration before the Court, a liberty is given to the petitioner to deposit the fine amount (as ordered by the Appellate Court on 08.11.2021) on or before 31.03.2022.

27. In case the amount of Rs.2,65,800/- is not deposited by 31.03.2022, the legal consequences shall follow.

28. Stay application too stands dismissed accordingly.

(DINESH MEHTA),J

55-A.Arora/-