IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

Crl.MC.No. 1544 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN CC 16/2014 of
J.M.F.C.-III(MOBILE),EKM.

PETITIONER(S)/ACCUSED:

SANTHOSH K.G., AGED 35 YEARS,
S/O.BALAKRISHNAN, 313 C, D.D.GOLDEN GATE,
PALACHUVADU JUNCTION, KAKKANAD, KOCHI - 682 022.

BY ADVS.SRI.SOORAJ T.ELENJICKAL
SMT.P.M.MAZNA MANSOOR

RESPONDENT(S)/COMPLAINANT AND STATE:

1. NANDAKUMAR B MENON,
S/O.LATE P.N.BALAKRISHNA MENON, APT - 901,
SUNNY PALACE, CHANGAMPUZHA SAMATHI ROAD,
EDAPPALLY P.O., KOCHI 682 024.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADVS. SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.THOMAS P.KURUVILLA
SRI.P.PRIJITH

R2 BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 23-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.MC.No. 1544 of 2015 ()

APPENDIX

PETITIONER(S)' EXHIBITS:

A1: THE CERTIFIED COPY OF THE COMPLAINT DATED 31/12/2013 FILED BY THE 1ST RESPONDONDENT BEFORE THE CHIEF JUDICIAL MAGISTRATE COURT ERNAKULAM.

A2: TRUE COPY OF THE AFFIDAVIT SWORN BY THE 1ST RESPONDENT BEFORE THE CHIEF JUDICIAL MAGISTRATE COURT IN ANNEXURE A1 COMPLAINT.

A3: TRUE COPIES OF THE DOCUMENTS PRODUCED BY THE COMPLAINANT BEFORE THE COURT BELOW ALONG WITH ANNEXURE A1 COMPLAINT.

RESPONDENT(S)' EXHIBITS: NIL

// True Copy//

P.A. to Judge

ss

K. RAMAKRISHNAN, J.

-- **[C.R.]**

Crl.M.C.No.1544 of 2015

Dated this the 23rd day of November, 2015

ORDER

This is an application filed by the accused in C.C.No.16/2014 on the file of the Judicial First Class Magistrate Court-III, Ernakulam, to quash the proceedings under Section 482 of the Code of Criminal Procedure.

2. It is alleged in the petition that the petitioner is the sole accused in C.C.No.16/2014 on the file of the Judicial First Class Magistrate Court-III, Ernakulam, which was taken cognizance by the magistrate on the basis of a private complaint filed by the complainant/ first respondent herein, alleging offence under Section 138 of the Negotiable Instruments Act.

3. The case of the complainant in the complaint was that there was an amount of ₹28,00,000/- due and in discharge of that liability, the accused had issued a cheque

for ₹28,00,000/- with date 01.11.2013. Even in the complaint, he had admitted that before the date mentioned in the cheque an amount of ₹6,00,000/- was paid and in spite of that the complainant presented the cheque and got it dishonoured and sent a notice claiming for the balance amount and the accused had issued reply notice stating that amount covered by the cheque is not really due and in spite of that a complaint has been filed under Section 138 of the Negotiable Instruments Act.

4. In view of the decision reported in **Joseph Sartho v. G. Gopinathan and Another (2008(4) KHC 463)**, the complaint is not maintainable as there is no endorsement obtained on the cheque for the amount already paid and at the time when the cheque was presented, the amount covered by the cheque is not really due and it cannot be said to be a legally enforceable debt as well. So proceeding with the complaint in view of the

dictum laid down in the above decision is nothing but abuse of process of court and there is no possibility of conviction and he prayed for quashing the proceedings.

5. Heard the counsel for the petitioner Sri.Sooraj T. Elenjickal and senior counsel Sri. S.Sreekumar appearing for the first respondent and Smt.Seena Ramakrishnan, Public Prosecutor appearing for the State/ 2nd respondent.

6. The counsel for the petitioner submitted that admittedly the cheque was issued for ₹28,00,000/- and before the date mentioned in the cheque, an amount of ₹6,00,000/- was paid and it was admitted in the complaint itself. So at the time when the cheque was presented, the amount mentioned in the cheuqe was not really due. So the complaint under Section 138 of the Negotiable Instrument Act is not maintainable in view of the dictum laid down in Joseph Sartho's case (supra).

7. On the other hand, counsel for the first respondent submitted that he had only claimed for the balance amount and there is a mistake crept in the division bench judgment that the endorsement must be made by the drawee before presenting the cheque which is not correct and the drawer has to make the endorsement and the drawer is not available and in such circumstances, when he made only claim for the balance amount while filing the complaint, it cannot be said that the complaint under Section 138 of the Act is not maintainable. Further whether he had made an attempt to make an endorsement and that was denied by the complainant and without allowing to make endorsement the complainant presented the cheque etc., are matter for evidence and in such circumstances the power under Section 482 cannot be invoked to quash the proceedings.

8. Heard the Public Prosecutor also.

9. It is an admitted fact that there was money transaction between the complainant and the accused and it is also in away admitted that the accused had issued the disputed cheque for ₹28,00,000/- drawn on the bank in which he is maintaining account with date 01.11.2013. It is also in away admitted by both the parties and it was admitted by the complainant in the complaint itself that, before the date mentioned in the disputed cheque, namely, 01.11.2013 an amount of ₹6,00,000/- was paid by the accused on different dates and it is also an admitted fact that the complainant had presented the cheque without getting any endorsement of part payment made by the accused as required under Section 56 of the Negotiable Instruments Act for the entire amount, but when the notice was issued, he claimed only the balance amount and since the accused had not paid the amount, according to him, the offence under Section 138 of the Act has been committed by

the accused and the complaint is maintainable, is the contention raised.

10. Section 138 of the Act, which reads as follows:

> **138. Dishonour of cheque for insufficiency, etc., of funds in the account.-** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extent to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless-
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the

> cheque, within fifteen days of the receipt of the said notice.

It is clear from Section 138 of the Act that, the person who is issuing the cheque is in discharge whole or in part of any debt or liability.

11. This is further clarified by reading Section 139 of the Act, which reads as follows:

> **139. Presumption in favour of holder.-** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

12. Here also what is mentioned is, it shall be presumed, unless the contrary is proved that the holder of the cheque received the cheque of the nature referred to in Section 138 for the discharge in whole or in part of any debt or liability. So it is clear from the Section itself that at the time when the accused issued the cheque and the complainant receives the cheque, it is intended by both the parties that the cheque was issued and received for the

whole or in part of any debt or liability which was actually due at that time. Further it is also settled law that if the accused did not pay the amount covered by the cheque within the time prescribed under law, and if it is dishonoured for the reasons mentioned in the Section, and in spite of the notice issued by the complainant within 15 days of receipt of the intimation dishonor from the bank, if the accused did not pay the amount within 15 days of receipt of such notice, then the offence under Section 138 of the Act is complete. So in order to attract the offence under Section 138 of the Act, there must be non-payment of the amount by the accused till the presentation of the cheque for the amount due and in spite of notice issued the amount is not paid, if it is really due as on that day, then the offence under Section 138 of the Act is attracted.

13. The question as to whether even if any part payment is made during the period of validity of the cheque

before presentation and if amount was claimed only for the balance amount whether the offence under Section 138 of the Act is attracted or not is considered by the Division Bench of this court in **Joseph Sartho v. G. Gopinathan and Another (2008(4) KHC 463)** as there were conflicting decisions on that aspect and the Division Bench has held that, if any payment has been made after the issuance of the cheque, but before presentation of the cheque on the date mentioned in the cheque, unless endorsement as required under Section 56 of the Negotiable Instruments Act is made in the cheque, then the complainant is not entitled to present the cheque for the entire amount and even sending notice for the balance amount will not cure the defect and in such circumstances offence under Section 138 is not attracted.

14. It is true that as who has to make the endorsement, there is some doubt created in the judgment.

But a reading of the judgment will go to show what is ultimately intended by the division bench is that the endorsement as required under Section 56 of the Negotiable Instruments Act has to be obtained before presenting the cheque to claim the balance amount available after deducting the amount paid from the amount shown in the cheque. If such an endorsement is not obtained by the payee of the cheque and if he presented the cheque for the entire amount, then it cannot be said that the said amount was legally due to him as on the date of the presentation of the cheque which make filing of the complaint under Section 138 of the Act not maintainable. Probably his remedy is to file a suit or resort to other legal proceedings to recover the balance amount and not to invoke the provision under Section 138 of the Act.

So in view of the dictum laid down by the division bench, which is squarely applicable to the facts of the case, the complaint filed by the first respondent against the petitioner is not maintainable and proceeding with the case will only amount to abuse of process of court and it is a fit case where the power under Section 482 of the Code of Criminal Procedure has to be invoked to quash the proceedings. Hence the petition is allowed. Further proceedings in C.C.No.16/2014 on the file of the Judicial First Class Magistrate Court-III, Ernakulam, as against the petitioner is hereby quashed.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-

K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge

ss