IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

TUESDAY, THE 7TH DAY OF APRIL 2015/17TH CHAITHRA, 1937

Crl.Rev.Pet.No. 364 of 2003

AGAINST THE JUDGMENT IN CRL.A.NO. 95/2000 of ADDITIONAL DISTRICT COURT, KOTTAYAM DATED 09-01-2003.

AGAINST THE ORDER IN CC 723/1997 of J.M.F.C.-I, KANJIRAPPALLY, DATED 10-03-2000.

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

JOHNSON MATHEW,
MONIPPALLY HOUSE, MEVADA P.O., KOTTAYAM DISTRICT.

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENT(S)/RESPONDENTS/COMPLAINANT:

1. K.M.JOSEPH,
KANJIRAKKATTU HOUSE, PARATHODE, SUPERVISOR,
ELECTRONIC WING, MALANADU DEVELOPMENT SOCIETY,
PARATHODU.

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

R1 BY ADV. SRI.SHAIJAN C.GEORGE
R2 BY PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No. 364 of 2003

Dated this the 7th day of April, 2015

ORDER

The revision petitioner herein is the accused in C.C. No.723 of 1997 on the files of the Judicial First Class Magistrate's Court-I, Kanjirapally, as well as the appellant in Crl.A.No.95 of 2000 on the files of the Additional Sessions Court, Kottayam. He was prosecuted for the offence punishable under Sec.138 of the Negotiable Instruments Act, on a complaint filed by the 1st respondent. He filed the above complaint as Power-of-Attorney of a society by name 'Malanadu Development Society'. After considering the evidence on record, the learned Magistrate found the revision petitioner guilty of the offence under Sec.138 of the

N.I. Act and convicted thereunder. He was sentenced to pay a fine of Rs.3,000/- and in default of fine, to undergo simple imprisonment for three months and to pay a compensation of Rs.1,37,000/- under Sec.357 of the Code of Criminal Procedure. Though, the revision petitioner had preferred the above appeal, after re-appreciating the evidence on record, the learned Sessions Judge confirmed the findings of conviction and modified the sentence and thereby allowed the appeal in part. In modification of the sentence imposed by the trial court, the revision petitioner was sentenced to undergo simple imprisonment till rising of the court and also directed to pay a compensation of Rs.1,37,000/- to the complainant and in default, to undergo simple imprisonment for three months. The legality and propriety of the concurrent findings of conviction and modified sentence are under challenge in this revision petition.

2. It is the case of the complainant that the

complainant is a charitable society registered under Charitable Societies Act and running a unit of manufacturing electronic chocks. The accused was conducting a private limited company by name 'Bellock Marketing and Exports Private Limited Company'. The accused had purchased electronic chocks from the complainant company from 1995 onwards and under that transaction, owed an amount of Rs.1,37,000/- to the complainant and in discharge of that liability, issued Ext.P2 cheque for an amount of Rs.1,37,000/- to the complainant. When the cheque was presented for encashment, the same was dishonoured and returned for want of sufficient funds. Though the complainant caused to issue a lawyer's notice, the accused didn't pay the cheque amount; but sent a reply notice denying the demand under the cheque. To prove the complainant's case, the Power-of-Attorney Holder was examined as P.W.1 and Exts.P1 to P10 were marked.

3. When questioned Sec.313 of the Cr.P.C., the accused pleaded not guilty and denied the entire transaction with the complainant. According to him, he owed no money to the society. The Bellock Marketing and Exports Private Limited Company was a private limited company and the said company had transaction with the complainant society. Besides the accused, Zacharia P. Joseph, P.T. Thomas, Abraham Jose and Cyriac were other Directors of the Company and Zacharia P. Joseph was the Power-of-Attorney Holder of the company. He committed financial mismanagement and thereby the company could not function. There is some dispute between the accused and the said Zacharia P. Joseph. Out of enmity towards him, Zacharia P. Joseph clandestinely obtained a blank signed cheque which was kept in the company to use it as and when required and converted the same to Ext.P2 cheque. Thereafter, he misused the said cheque to harass him by prosecuting

him under that cheque. To prove the said contention, Zacharia P. Joseph was examined as D.W.1 and the accused was examined as D.W.2 and Exts.D1 to D7 were also marked. After considering the evidence on record, the courts below concurrently found that the complainant had succeeded in discharging the initial burden of proving execution and issuance of the cheque and thereby the presumption under Secs.118 (a) and 139 of the N.I. Act would stand in favour of the complainant. But, the accused miserably failed to rebut the said presumption which stood in favour of the complainant.

4. Heard the learned counsel for the revision petitioner and the learned counsel for the respondent/complainant.

5. The learned counsel for the accused advanced arguments challenging the concurrent findings to the effect that the complainant successfully discharged the initial burden of proving the execution and

issuance of the cheque. The learned counsel drew my attention to the averments in the complaint and submits that in the complaint nothing stated about the original transaction under which the amount was due to the society. So also, no evidence had been produced to show the original transaction which was denied by the accused. Unless and until the initial burden is discharged, no rebuttal evidence would come up on the accused.

6. Per contra, the learned counsel for the respondent/complainant advanced arguments to justify the finding that complainant had successfully discharged initial burden of proving execution and issuance of the cheque. According to the learned counsel, it is not necessary to give a complete account of the original transaction in the complaint. But, subsequently in evidence the complainant had produced Ext.P9 ledger account copy of the account of the accused. Similarly, the evidence of P.W.1

unambiguously disclosed the details of the original transaction under which the amount was due to the complainant from the accused. Further, the learned counsel drew my attention to inconsistent stance taken by the accused as regards the way by which the complainant came into possession of the cheque.

7. In view of the rival contentions, the question to be considered is, whether the court below is justified in finding that the complainant had successfully discharged initial burden of proving, execution and issuance of the cheque.

8. It is the case of the complainant that the accused had purchased electronic chocks from the complainant society and in that transaction, the accused owed a sum of Rs.1,37,000/- to the complainant and in discharge of that debt, the accused had drawn and issued Ext.P2 cheque. Per contra, the case of the accused is that he had no personal transaction with the complainant society and

the company by name ' Bellock Marketing and Exports Private Limited Company' in which the accused was also a Director, had business transaction with the complainant society; but no amount was due to the society. That apart, it is also contended that Ext.P2 signed cheque had been clandestinely taken away from the company and handed over to the society by D.W.1 when the accused and D.W.1 fell apart.

9. I have meticulously examined the entire evidence on record and I find that though the evidence - both oral and documentary, are in abundance, none of these documents or the oral evidence given by the parties are capable enough to prove the disputed fact whether the purchase of electronic chocks from the society was a personal transaction between the society and the accused. Put it differently, whether the liability due under Ext.P2 cheque is a personal liability of the accused. When the complainant asserts personal transactions and the

accused denies the same, sufficient evidence is required to decide the said fact in issue. This question assumes much significance when the society has no case that the business transaction was between the society and the company and the accused as a Director or a person who dealt with the transaction with the complainant issued Ext.P2 cheque from his personal account for discharging the amount due to the society from the company. Even if the accused had no personal transaction with the company, a cheque issued by the accused for discharging the liability of the company can be accepted and in case of dishonour of that cheque the accused would be held liable to be punished under Sec.138 of the N.I. Act, since guarantee cheque as well as security cheque also would fall under penal consequences [Mohanachandran Nair v. Cheriyan (2012 (4) KLT SN35)]. But interestingly here the complainant has no such case and consistent case pleaded in the complaint is that Ext.P2 cheque was issued to discharge personal liability of the accused. When P.W.1 was examined, he deposed as given below:

> "പ്രതി വാദിയ്ക്ക് 1,37,000 രൂപ തരാനുണ്ട്. ഇലക്ട്രോണിക് ചോക്ക് കടമായി വാങ്ങിയ വകയിൽ കിട്ടാനുള്ള തുകയാണ്. 1995 ഒക്ടോബർ മൂന്നു മുതൽ 1996 ഒക്ടോബർ വരെയുള്ള കാലഘട്ടത്തിലെ തുകയാണ്. ഞാൻ രൂപ ചോദിച്ചു. പ്രതി ചെക്ക് തന്നു."

10. At this juncture, it is to be remembered that the complainant is a society registered under the Charitable Societies Act and having various manufacturing activities. If that be so, such a society cannot function without proper accounting system and P.W.1 himself admitted in this way:

> "മലനാട് സൊസൈറ്റിയ്ക്ക് അക്കൗണ്ട് ബുക്കുണ്ട്."

11. I am of the opinion that when the accused seriously disputed the personal transaction alleged by the complainant, the complainant could have controverted the denial of the personal transaction, by

producing original account book which would show the amount due from the accused, The complainant had produced Ext.P9 ledger copy of the bank account. But I find that Ext.P9 would not serve the above said purpose.

12. It is true that, in the complaint, the complainant need not give full details of the original transaction under which the liability accrued. But when the transaction is denied in the reply notice, and P.W.1 was cross-examined suggesting such denial of entire transaction, certainly the complainant should have produced the original account book by which the transaction is evidenced. It is pertinent to note that the original complainant has not mounted the witness box and the Power-of-Attorney Holder was examined for the original complainant. On an analysis of his evidence, I found that his evidence is not sufficient to discharge initial burden of proving execution and issuance of cheque beyond doubt. Considering the

fact that a substantial amount is allegedly due to the complainant society I am inclined to grant one more opportunity to the complainant to produce original books of account which would prove the legally enforceable liability. I do not propose to make any observation on other evidence available on record.

13. Consequently, the impugned judgments under challenge are set aside and the matter is remitted back to the trial court for fresh consideration after affording sufficient opportunities to both parties to adduce further evidence. However, the court below shall pass judgment afresh at the earliest, at any rate, within a period of two months from the date of receipt a copy of this order.

This revision petition is allowed accordingly.

Sd/-
(K. HARILAL, JUDGE)

Nan/ //true copy// P.S. to Judge