

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 1ST DAY OF DECEMBER 2015/10TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 1153 of 2003 ()

AGAINST THE JUDGMENT IN Crl.APPEAL 140/1999 of ADDL. SESSIONS COURT (SPL. COURT), KOTTAYAM DATED 24-02-2003

AGAINST THE JUDGMENT IN CC 702/1992 of C.J.M.,KOTTAYAM DATED 03-06-1999

REVISION PETITIONER(S):

1. VARGHESE ANDREWS,
PROPRIETOR,
FRIENDS BANANA MART,
MUNICIPAL VEGETABLE MARKET,
KOTTAYAM.
2. K.G.R. KAIMAL,
PROPRIETOR,
FRIENDS BABANA MART,
MUNICIPAL VEGEBLE MARKET,
KOTTAYAM.

**BY ADVS. SRI.K.M.VARGHESE
SRI.SHAHUL HAMEED MOOPPAN**

RESPONDENT(S):

1. STATE OF KERALA REPRESENTED
BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.
2. K.C.JACOB,
KURUCHIRA VADAKKETHIL
PUTHENCHANTHA P.O.
KOTTAYAM.
- *3. MOLLY JACOB,
KURUCHIRA VADAKKETHIL,
PUTHENCHANTHA P.O.,
KOTTAYAM.

- *4. GLADSON JACOB,
KURUCHIRA VADAKKETHIL,
PUTHENCHANTHA P.O.,
KOTTAYAM.**
- *5. WILSON JACOB,
KURUCHIRA VADAKKETHIL,
PUTHENCHANTHA P.O.,
KOTTAYAM.**
- *6. NELSON JACOB,
KURUCHIRA VADAKKETHIL,
PUTHENCHANTHA P.O.,
KOTTAYAM.**

R1 BY PUBLIC PROSECUTOR SRI.N.SURESH

*** Addl. Respondents 3 to 6 are impleaded as per order dated 22.07.2013
in Crl.M.A.1289/2013 in Crl.R.P.1153/2003.**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
01-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

(C.R.)

P.D. RAJAN, J.

Crl.R.P.1153 of 2003

Dated this the 1st of December, 2015

ORDER

The revision petitioners were accused in C.C.702/92 on the file of the Chief Judicial Magistrate, Kottayam for offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the N.I.Act). The complainant's case in the trial court was that, accused 1 and 2, who are the proprietors of a business firm namely Friends Banana Marts, at Municipal Vegetable Market, Kottayam, borrowed a sum of Rs.31,000/- from the complainant and in discharge of that debt, they issued a cheque for Rs.16,000/- (Ext.P2) and another cheque for Rs.15,000/- (Ext.P3). When those cheques were presented for encashment, they were dishonoured for the reason of funds insufficient. Complainant demanded the amount by giving a notice in writing to the accused. Even after notice, there was no payment. In the circumstance,

the above complaint was filed in the trial court.

2. The complainant examined PW1 and PW2 and marked Ext.P1 to P15 as documentary evidence. The incriminating circumstances brought out in evidence were denied by the accused while questioning him under Section 313 Cr.P.C. Accused examined DW1 and DW2 and marked Ext.D1 as his documentary evidence. The learned Magistrate convicted the accused under Section 138 of the N.I. Act and sentenced to pay a fine of Rs.15,000/-, in default, simple imprisonment for 3 months each. Against that, he preferred Crl. Appeal 140/99 before Sessions Judge (Spl.), Kottayam, which was dismissed by that court. Being aggrieved by that he preferred this revision petition.

3. The learned counsel appearing for the revision petitioner contended that Ext.P2 cheque of Rs.16,000/- was issued on 1.5.92, Ext.P5 dishonour memo shows that Ext.P2 was dishonoured on 29.05.92. There was no demand for the due amount by giving a notice in writing to the accused and there is non-compliance of Section 138 (b) of N.I. Act. This fact which ought to have been in favour of the accused was not considered by the courts

below.

4. I heard the Public Prosecutor, who contended that the findings of the trial court is proper and no interference is necessary.

5. According to Section 138 of the N.I. Act, where any cheque drawn by a person on an account maintained by him with a bank for payment of money to another person from that account, in discharge of any debt or liability, is returned by the bank, either the amount of money in that account is insufficient to honour the cheque or that it exceeds the amount arranged from that account with the bank, such person shall be deemed to have committed an offence under Section 138 of the N.I. Act. This deemed provision is enacted subject to the condition that the cheque has to be presented within the statutory period in which it is drawn or within the period of its validity. Secondly, the payee or holder in due course of the cheque shall make a demand for such amount by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information from the bank and non-payment of due amount after receipt of notice by

the drawer of the cheque.

6. Section 138(b) says that, 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 (before amendment, within fifteen days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid. PW1 deposed that he demanded the money by giving Ext.P6 notice dated 12.06.92. Ext.P10 is the acknowledgment card, but postal receipt has not been produced in the trial court to show that he made a demand within the period provided under Section 138 (b) of the N.I. Act. Notice envisaged under Section 138(b) by payee to the drawer of the cheque which has been dishonoured can be sent by post or by fax. The responsibility on the payee on receipt of information from the bank with regard to the return of the cheque unpaid is to make a demand for payment within 15 days. It should be “by giving a notice in writing to the drawer of the cheque” and the method of making demand is prescribed in the clause. If notice has been

sent by registered post, payee has to produce the postal receipt and the copy of the notice and the acknowledgment card so as to prove the giving of notice and receipt of notice within the statutory period. The penal provisions of the special statute must be construed strictly. Notice of demand of payment must be made in writing and not otherwise. Apex Court in **SIL Import USA V. M/s.Exim Addes Silk Exporters, Banglore (AIR 1999 SC 1609)** held that notice given by fax is valid within the meaning of Section 138(b) of the N.I. Act. Therefore a realistic interpretation has to be given to the word 'giving notice'. If the payee has despatched notice in the correct address of the drawer within thirty days from the date of intimation from the bank, (Earlier this period was 15 days but subsequently the period has been increased upto 30 days.) it should be pertinent to note that delay in every day would be fatal for the remedy under Section 138 of the N.I.Act. Apex court in **Tomy Jacob Kattikkaran V. Dr.Thomas Manjalaya (AIR 1998 SC 366)** held that the complainant did not serve notice within 15 days period and the evidence adduced

was insufficient to make out a prima facie case.

7. Apex court in **Rahul Builders V. Arihant Fertilizers & Chemical [2007(4) KLT 977 (SC)]** held as follows;

“10. Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of S.138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to S.138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology “payment of the said amount of money”. Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition

precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent No. 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs. 8,72,409/-. The notice was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs. 8,72,409/-. No demand was made upon it to pay the said sum of Rs. 1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it."

Therefore analysing Section 138(b) of the N.I.Act, the essential requirement of the notice may be grouped as follows:

- 1) Notice must be in writing,
- 2) it shall be issued by the payee or holder in due course of the cheques,
- 3) demand is of the said amount of money, and
- 4) it shall be made within 30 days of intimation of dishonour from the bank.

8. Now the question is whether proof of such demand is necessary under Section 138(b). I have gone through the oral testimony of PW1, who stated that Ext.P2 was issued in discharge of a debt for Rs.16,000/-, when it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P5 is the dishonour memo dated 29.05.92. The second respondent demanded the amount by giving Ext.P6 lawyer notice dated 12.6.92. PW2, the Branch Manager of the bank deposed about Ext.P5 dated 29.05.92, but PW1 has not produced any document to prove that he made the demand in time. Analysing the above evidence, it is clear that Ext.P2 was dishonoured for the reason of funds insufficient. Then provision under Section 138(b) of the N.I.Act is mandatory. While giving a realistic interpretation to the

mandatory provision, the payee has to show the despatched notice in the correct address of the drawer and 'proof' is necessary. If notice is sent by post, the copy of the notice, postal receipt and postal acknowledgment are the relevant documents to prove the sufficient compliance with the above legal requirement. Then only the conditions pertaining to the notice incorporated under Section 138 (b) of the N.I. Act would be completed. In **Central Bank of India V. Saxon Farms [1999(4) Crimes 221 (SC)]** it was held that though no form of notice is prescribed, the requirement is that notice shall be given in 15 days of the receipt of information from the bank regarding return of the cheque as unpaid and in the notice, demand for payment of the amount of cheque has to be made. The service of notice is a condition precedent for filing a complaint under Section 138 of the N.I. Act.

9. Apex Court in **Alavi Haji V. Muhammed [2007 (3) KLT 77(SC)]** held as follows:

“Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of S.138 of the Act, in order to enable the Court to draw

presumption or interference either under S.27 of the G.C. Act or S.114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause(b) of proviso to S.138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basis facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under S.138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforementioned mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to S.138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and

to provide him an opportunity to make amends.”

10. A close scrutiny of the evidence in this case shows that complainant has not produced the postal receipt to prove that he had made a demand as stated under Section 138(b) of the N.I. Act. Apex court in **Monnoth Investments Ltd. V. Puttukola Pvt. Ltd. (AIR 2001 SC 2752)** and **Sil Import, USA V. Exim Aides Silk Exporters AIR (1999 SC 1609=1999 KHC 317=2001 SCC CrI 1184)** explained the importance of giving notice in writing. Therefore, the payee or the holder of the cheque has a statutory obligation to give notice within the period, because he sustained a loss due to the dishonour of the cheque. In such a situation, payee has to make a demand by giving a notice in writing, if that requirement was complied and there is failure of the drawer to pay the cheque amount within 30 days (earlier 15 days) from the date of such notice, he can launch prosecution against the drawer. Since no mode of service of demand notice has been prescribed under the Act, it is necessary to produce relevant proof with regard to

despatch and service of notice. Moreover the benefit of Section 27 of the General Clauses Act 1987 may not be available to the complainant when there is no proof with regard to demand notice. The presumption of service under the statute would arise only when it is sent by registered post in terms of Section 27 of the General Clauses Act. Therefore, it is clear that giving a notice under Section 138(b) is mandatory on receipt of the intimation from the bank. The evidence shows that there is noncompliance of mandatory provision, and no offence under Section 138 of the Negotiable Instrument Act will be attracted.

11. In the result, the conviction and sentence passed by Chief Judicial Magistrate, Kottayam, which was upheld by the appellate court under Section 138 of the N.I. Act are set aside. The revision petitioners are found not guilty under Section 138 of the N.I. Act and they are acquitted thereunder.

This revision petition is allowed.

STK

//TRUE COPY//

//P.A. TO JUDGE//

Sd/-
P.D. RAJAN,
JUDGE