

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

Crl.Rev.Pet.No. 1254 of 2003 ()

**AGAINST THE JUDGMENT IN CRL. APPEAL 4/2000 of SESSIONS COURT,
KOZHIKODE, DATED 16-12-2002**

&

**AGAINST THE JUDGMENT IN ST 1169/1996 of J.M.F.C.,
NADAPURAM, DATED 29-11-1999**

REVISION PETITIONER(S):

**C.V. RAJAN, S/O. GOVINDA KURUP,
LELLA NIVAS, P.O., KEEZHUR, IRITTY.**

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT(S):

- 1. ILLIKKAL RAMESAN, S/O. BALAKURIP,
KUTTIPPURAM AMSOM, CHELAKKAD DESOM.**
- 2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

R2 BY PUBLIC PROSECUTOR SRI. RAJESH VIJAYAN.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
25-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

SS

K. RAMAKRISHNAN, J.

[C.R.]

.....
Crl. R. P.No.1254 of 2003
.....

Dated this the 25th day of February, 2015

ORDER

Accused in S.T.No.1169/1996 on the file of the Judicial First Class Magistrate Court, Nadapuram, is the revision petitioner herein. The case was taken on file on the basis of a private complaint, filed by the complainant/ first respondent against the petitioner alleging offence under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, the revision petitioner obtained an amount of ₹2,30,000/- on the promise of obtaining a job of clerk in B.E.M. School and when he realised that he was not able to fulfil the promise, on demand, he had issued Ext.P1 cheque dated 30.03.1996, on 25.03.1996 to the complainant in discharge of that liability and the cheque when presented was dishonoured for the reason 'funds insufficient' vide

Ext.P2 dishonour memo, and the complainant issued Ext.P4 notice vide Ext.P9 postal receipt and the same was received by the revision petitioner evidenced by Ext.P5 postal acknowledgment. He had sent Ext.P6 reply denying the allegations. Exts.P7 and P3 are the ledger extracts and Ext.P8 is the memo issued from the bank intimating the dishonour to the complainant. The revision petitioner had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the revision petitioner appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW2 and the bank managers of the drawee bank and collecting bank were examined as PWs 1 and 3 and Exts.P1 to P9 were marked on his side. After closure of the complainant's evidence, the revision

petitioner was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, there was no transaction between himself and the revision petitioner and he had not issued any cheque to the revision petitioner and the cheque given to one Navaneeth Krishnan, was somehow obtained by the complainant by one Balan Nair and misusing that cheque and the present complaint was filed. In order to prove his case, DWs 1 and 2 were examined and Ext. D1 was marked. After considering the evidence on record, the court below found that the revision petitioner had committed the offence punishable under Section 138 of the Negotiable Instruments Act and convicted him thereunder and sentenced him to undergo simple imprisonment for 9 months and also to pay a sum of ₹1,00,000/- as compensation to the complainant, in default to undergo simple imprisonment for three months under

Section 357(3) of the Code of Criminal Procedure. Aggrieved by the same, he filed Crl.Appeal No.4/2000 before the Sessions Court, Kozhikode, which was made over to First Additional Sessions Court, Kozhikode, for disposal and the learned Additional Sessions Judge by the impugned judgment dismissed the appeal. Aggrieved by the same, the present revision has been filed by the revision petitioner/accused before the court below. In spite of notice issued first respondent did not appear.

4. Heard the counsel for the revision petitioner and learned Public Prosecutor.

5. The counsel for the revision petitioner submitted that, for return the amount for which the cheque was given, was said to have been obtained for providing a job and since it was not given for an illegal purpose, it cannot be said to be issued in discharge of an enforceable debt and so the action under Section 138 of the Negotiable Instruments Act is not attracted. Further, the notice issued

is not proper and the name of the bank shown is not correct and on that ground also, the complaint is not maintainable. He had relied on the decision reported in **Aniyan Thomas Chacko v. Tevarvelil Bankers (2006(4) KLT 245)** in support of his case.

6. On the other hand, the learned Public Prosecutor supported the concurrent findings of the court below.

7. The case of the complainant in the complaint was that, the revision petitioner had obtained ₹2,30,000/- from him on promising to obtain a clerk job in B.E.M. School and since he could not fulfil the promise and when the amount was demanded, he had issued Ext.P1 cheque and the cheque when presented was dishonoured and in spite of notice issued he had not paid the amount. Though a contention was taken in the lower court that, the notice was issued beyond time on perusal of the postal receipt later produced, it was seen that it was sent in time, so that

contention is not available. It is true that, in the complaint it was mentioned that, the amount was paid on the promise of procuring a job and when he could not fulfil the promise, on demand the cheque was issued. It may be mentioned here, though a person had obtained money for doing certain thing which he may know that he may not be able to fulfil the same, the innocent persons who were giving money on the basis of that promise cannot be blamed. Further law does not prohibit a person repaying the amount which he obtained on some illegal promise. So when the cheque was issued for repayment of that amount which he wanted to pay and it was issued in discharge of the amount received by him on making some false promise cannot be said to be an unenforcible debt, as law does not prohibit a person returning the amount which he obtained by illegal means. Once that cheque is issued, in discharge of the amount which he had obtained illegally, law does not prohibit prosecuting him for an offence under Section 138 of the

Negotiable Instruments Act, if other conditions are satisfied. So the submission made by the counsel for the revision petitioner that, the cheque was not issued in discharge of a legally enforceable debt, cannot be accepted.

8. The next contention raised by the counsel for the revision petitioner was that, in the notice, the name of the bank mentioned was wrong and vague and the revision petitioner had sent a reply notice denying that he had not issued the cheque and he had no transaction with the complainant. It is true that in Ext.P3 notice, the name of the bank was shown as Service Co-operative Bank, Iritty Branch, but the amount and date of the cheque was correctly mentioned. The case of the revision petitioner in the reply was that, he had no transaction and he had not issued any cheque to the complainant. Further at the time when PW1 was examined, he had no case that he was not having any account in the bank in which the cheque was issued and he had any other transaction with the

complainant in respect of which some other cheque was given. Further the case of the revision petitioner was that, the cheque given to one Navaneeth Krishnan for some money transaction between them was obtained by one Balan /DW2 for some amount due from him and DW2 being a relative of PW1, the cheque was some how obtained and the present complaint was filed. So it is clear from this that, he was aware of the nature of the cheque on the basis of which the complaint was filed, though the name of the bank was not correctly mentioned.

9. In the decision reported in **Aniyan Thomas Chacko v. Tevarvelil Bankers (2006(4) KLT 245)**, the dictum laid down was not in respect of any defective notice, though there was a passing observation regarding an earlier notice issued and the dictum laid down in that decision was when a second notice was issued within time, the complaint filed on that basis is maintainable, when the maintainability of the complaint was challenged by the

accused in that case. In that decision, there was an observation regarding the earlier notice, where it was mentioned that, the name of the bank was wrongly shown and the accused sent a reply to that notice stating that the amount covered by that cheque has been discharged and it was on that basis, he had sent another reply showing the correct cheque number and the bank after presenting the cheque again and on the basis of which the complaint was filed and the maintainability of filing of the complaint on the second notice was challenged in that case and this court has come to the conclusion that, if the cheque was presented once again within the validity period and further notice was issued, then complaint on the basis of second notice is maintainable. So it cannot be taken as an authority for coming to the conclusion that merely because there was some mistake in the notice regarding the bank, the notice is defective and the complaint is not maintainable. Further in the complaint, it was specifically mentioned that, it was a

mistake and no question has been put to PW1 regarding this aspect, when he was cross examined as well.

10. Further in the decision reported in **Indira v. Adinarayana [2003(3) KLT 1042 (SC)]**, the question as to whether when a common notice was issued in respect of two cheques issued, one to the husband and other to the wife and on the basis of a common notice when two cases were filed, the Hon'ble Supreme Court has held that, merely because a common notice was issued is not a ground to come to the conclusion that the notice is defective and if the particulars of the amount demanded is in tune with the amount mentioned in the cheque and if no prejudice has been caused to the accused on account of the same condition, then the complaint filed on the basis of a common notice is maintainable.

11. Further in the decision reported in the decision reported in **Janardhanan v. Jayachandran (2005 KHC 143)** this court has held that, merely because the

notice issued was not signed by the counsel will not make that cheque defective and complaint filed on that basis is maintainable.

12. Further in the decision reported in **Viswanathan v. Ramachandran Nair (1996 KHC 337)**, when the cheque number mentioned in the notice was found to be defective and not correct, this court has held that, that mistake cannot be said to have misled the drawer of the cheque and there is sufficient compliance and it cannot be said to be a defecting notice and the notice is proper and the complaint filed on that basis is maintainable.

13. Same view has been reiterated in the decisions reported in **Satyavan Chaplot v. Rajendra [1998 KHC 3082 (Rajasthan High Court)]**; **Hasainar N. v. M. Hasainar (2009 KHC 386)** and **Abdul Rehman M. Mulgand v. Mohammad Hashan Mulgand and Another (2006 KHC 2247)**. In all these decisions it has been observed that, the intention of sending notice Section 138 is

to inform the drawer of the cheque about the dishonour of the cheque and demand the amount mentioned in the cheque, so as to give an opportunity to him to pay the amount, so as to avoid prosecution under Section 138 of the Negotiable Instruments Act. Unless it is proved by the accused that there was some other transaction between the accused and the complainant and there were other cheques also given and the defect in the name of the bank or number of the cheque shown has caused prejudice to him so as to find out as to whether such a cheque has been given or not, it cannot be said that, such a mistake committed in sending the notice is not fatal in filing a complaint under Section 138 of the Act. In this case, no question has been put to PW1 regarding the mistake and also the possible prejudice that has been caused on account of the same. He had no case that, he had given any other cheques drawn on some other banks to the complainant and those transactions have been settled between them as well. So under the

circumstances, the submission made by the counsel for the revision petitioner that, since notice is defective, the complaint is not maintainable and as it is not proper notice as contemplated under Section 138 of the Act cannot be accepted and the same is liable to be rejected.

14. As regards the case of the complainant is concerned, the complaint had gone to the witness and deposed the circumstances under which the amount was paid and the cheque was issued. The revision petitioner had no case that the signature of the cheque was not his. Further in order to prove his case, he had examined DW1, the police constable, who registered Ext.D1 first information report on the basis of a complaint given by DW2 for cheating and the complainant in that case was examined as DW2. DW2 had categorically stated that, he had not received any cheque and he had not obtained any cheque forcibly from Navaneeth Krishnan, which was said to have been handed over to him by the revision petitioner. So the

evidence adduced on the side of the revision petitioner is not helpful to prove that, the cheque given to some one else was misused and it was some how obtained by the complainant and the present complaint was filed. Further he did not examine Navaneeth Krishnan with whom he had some transaction. His case was that, the cheque was obtained from Navaneeth Krishnan by using force by DW2. If that be the case, the said Navaneeth Krishnan will be the best person to speak about the factum of Ext.D1 cheque being obtained from the revision petitioner was forcibly obtained by DW2 and handed over to the complainant and the present complaint was filed. So under the circumstances, the courts below were perfectly justified in rejecting the conditions of the revision petitioner and relying on the evidence of PW2 and coming to the conclusion that the revision petitioner had issued Ext.P1 cheque in discharge of an amount legally due from the accused to the complainant, which when the presented was

dishonoured for the reason 'funds insufficient' and in spite of notice issued, he had not paid the amount and thereby he had committed the offence punishable under Section 138 of the Negotiable Instruments Act and rightly convicted him for the said offence. The concurrent findings of the court below on this aspect do not call for any interference.

15. As regards the sentence is concerned, the court below had sentenced him to undergo simple imprisonment for nine months and also to pay a compensation of ₹1,00,000/-, in default to undergo simple imprisonment for three months more under Section 357(3) of the Code of Criminal Procedure, which was confirmed by the appellate court. But in the decision reported in **Damodar S. Prabhu v. Sayed Babalal H. [JT 2010 (4) (S.C.)457]** and also in **Kaushalya Devi Massand v. Roopkishore [AIR 2011 (SC) 2566]**, the Hon'ble Supreme Court has held that, offences under Section 138 are basically of civil nature, but criminal colour has been

given by incorporating the same in the Negotiable Instruments Act. Further in the same decisions, it has been observed that, the intention of the legislature enacting the provision was to make the drawer of the cheque to pay the amount, by giving him an opportunity and not to send him to jail. So considering the circumstances, this court feels that instead of providing substantive sentence of imprisonment, directing the revision petitioner to pay the cheque amount as compensation to the complainant and reducing the substantive sentence to imprisonment till rising of the court by enhancing the default sentence from nonpayment of compensation will be sufficient and that will meet the ends of justice. So the sentence of simple imprisonment of nine months and further direction to pay a compensation of ₹1,00,000/- to the complainant, in default to undergo simple imprisonment for three months under Section 357(3) of the Code of Criminal Procedure and confirmed by the appellate court is set aside and the same

is modified as follows:

The revision petitioner is sentenced to undergo imprisonment till rising of the court and also to pay the cheque amount of ₹2,30,000/- to the complainant as compensation, in default to undergo simple imprisonment for six months under Section 357(3) of the Code of Criminal Procedure. Four months time is granted to the revision petitioner to pay the amount and the revision petitioner is granted time till 25.06.2015 to pay the amount, till then, the execution of sentence is directed to be kept in abeyance. If any amount has been deposited by the revision petitioner before the court below for suspending the sentence as directed by this court or by the Sessions Court, it is directed to be adjusted towards this amount and he need to pay only the balance amount within the time mentioned above.

With the above modification of the sentence alone, the revision is allowed in part and disposed of accordingly. Office is directed to communicate this order to the court below, immediately.

Sd/-
K. Ramakrishnan, Judge

// True Copy //

P.A. to Judge

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