

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

Crl.Rev.Pet.No. 2016 of 2003 ()

**AGAINST THE JUDGMENT IN CRA 83/1996 of 1st ADDL. SESSIONS COURT,
TRIRUVANANTHAPURAM DATED 18-03-2003**

**AGAINST THE JUDGMENT IN CC 114/1995 of JMFC-V, THIRUVANANTHAPURAM(SPL.
COURT-MARKLIST CASES) 14.02.1996**

REVISION PETITIONER(S):

**K.SADANANDAN,
VIJAYAVILASOM,
ARUVIPURAM,
NEYYATTINKARA.**

BY ADV. SRI.CIBI THOMAS

RESPONDENT(S):

- 1. V.S. SATHEESH KUMAR,
SUKHAVAS,
KOTHALAM ROAD,
FORT, THIRUVANANTHAPURAM.**
- 2. STATE OF KERALA REPRESENTED BY
ADDL. P.S. SRI.S.R.JAYAKUMAR**

**R1 BY ADV. SRI.BASANT BALAJI
ADV. SRI.M.DINESH**

R2 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 09-
06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

P.D. RAJAN, J.

Crl. R.P. No.2016 of 2003

Dated this the 9th day of June, 2015

“C R”

ORDER

This criminal revision petition arises out of the judgment in Crl.Appeal No.83/96 of the 1st Addl. Sessions Judge, Thiruvananthapuram for offence under Section 138 of the Negotiable Instruments Act, 1881. The revision petitioner was accused in C.C.114/95 of the Judicial First Class Magistrate Court-V, Thiruvananthapuram for offence under Section 138 of the N.I.Act, where he was convicted and sentenced thereunder.

2. The case of the first respondent/complainant in the trial court was that on 12.08.90, the revision petitioner borrowed a sum of ₹80,000/- from the first respondent with an undertaking to repay the amount as and when required, and in discharge of the debt he issued a cheque drawn on State Bank of Travancore, Nellimoodu branch. When the cheque was presented for encashment, it was dishonoured for the reason, “cheque reported lost”. Thereafter, first respondent made a demand for the

payment of the said amount by giving a notice in writing to the drawer of the cheque. There was no response from him. In the circumstance, he filed the above complaint in the Judicial First Class Magistrate Court-V, Thiruvananthapuram.

3. To prove the allegation, the first respondent examined PW1 and PW2 and admitted Ext.P1 to P11 in evidence. The incriminating circumstances brought out in evidence were denied by the revision petitioner while questioning him. He did not adduce any defence evidence. The trial court after sifting and weighing the evidence on record, convicted the accused. Against that, he preferred Crl.Appeal No.83/96, in which the first respondent produced Ext.D1 to D4 as his defence evidence. The appellate court after considering the evidence, confirmed the conviction passed by the trial court and modified the sentence.

4. The learned counsel appearing for the revision petitioner contended that Ext.P1 was dishonored on the ground, "cheque reported lost". When the said cheque is

reported as lost and returned by the bank on that ground no offence will attract under Section 138 of the N.I. Act.

5. The learned counsel appearing for the first respondent contended that as per Ext.P10, copy of the ledger shows that there was insufficient fund and the offence under Section 138 will automatically be attracted.

6. According to Section 138 of the Negotiable Instruments Act, 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 under Section 138 of the Negotiable Instruments Act. 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 makes a demand for payment of the said amount of money by giving a notice in writing to the drawer of the cheque within the statutory period on the date of receipt of information from the bank regarding the return of the cheque as unpaid. Therefore, if the cheque is dishonoured for the reason: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

7. The position is different when the cheque is returned by the bank on the ground that it was reported 'lost' by the drawer. This question was considered by the Apex Court in **Raj Kumar Khurana v. State of (NCT of Delhi) 2009 (2) KLT 632 (SC)**. The question involved in the above case was whether a return of cheque by the bank on the ground that it was reported lost by the drawer would attract the penal provisions contained in Section 138 of the N.I. Act, 1881. In the above decision, it was

held in para 5 that;

“That the above said cheque in question was presented by the complainant for encashment through its bearers, namely State Bank of India, Azadpur Branch, Delhi - 33, but the same was returned as dishonoured with the remarks “SAID CHEQUE REPORTED LOST BY THE DRAWER”. This intimation was received by the complainant from the bankers on 27.7.2001 and accordingly a notice dt. 3.8.2001 was sent to the accused requesting the accused to make payment of the above said cheque amount and on 17.8.2001 the accused sent reply through his Advocate denying his liability falsely taking the plea that the cheque in question was lost as stolen by the complainant.”

8. The Legal Fiction created under Section 138 of the N.I. Act, when a cheque is returned by the bank unpaid has been explained in para 10 as follows:

“10. A bare perusal of the aforementioned provision would clearly go to show that by reason thereof a legal fiction has been created. A legal fiction, as is well known, although is required to be given full effect, has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself.

In State of A.P. & Anr. v. A.P. Pensioners Association

& Ors. ((2005) 13 SCC 161), this Court held:

“...In other words, all the consequences ordinarily flowing from a rule would be given effect to if the rule otherwise does not limit the operation thereof. If the rule itself provides a limitation on its operation, the consequences flowing from the legal fiction have to be understood in the light of the limitations prescribed. Thus, it is not possible to construe the legal fiction as simply as suggested by Mr. Lalit.”

11. S.138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. (See *R. Kalyani v. Janak C. Mehta & Ors.* ((2009) 1 SCC 516) and *DCM Financial Services Ltd. v. J.N. Sareen & Anr.* (2008 (2) KLT 762 (SC) = (2008) 8 SCC 1). Such a penal provision, enacted in terms of the legal fiction drawn would be attracted when a cheque is returned by the bank unpaid. Such non-payment may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank.

Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with.

The court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with.

The parameters for invoking the provisions of S.138 of the Act, thus, being limited, we are of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of S.138 of the Act.

12. The court while exercising its jurisdiction for taking cognizance of an offence under S.138 of the Act was required to consider only the allegations made in the complaint petition and the evidence of the complainant and his witnesses, if any. “

9. The penal provision, enacted under Section 138 of the Negotiable Instrument Act shows that a legal liability drawn would be attracted when a cheque is returned by the bank unpaid. It explains that, such non-payment by the bank may either be: (i) because of the amount of money standing to the credit of that account is insufficient to honour the cheque, or (ii) it exceeds the amount arranged to be paid from that account by an agreement made with that bank. Before a proceeding the legal requirements mentioned therein must be complied with

and convince the court that all the ingredients of the offence have been complied with. Therefore it is clear that the parameters for invoking the provisions of S.138 of the Act being limited, I am of the opinion that refusal on the part of the bank to honour the cheque would not bring the matter within the mischief of the provisions of S.138 of the Act.

10. Considering the above limitation, the question here is, whether a cheque is returned by the bank on the ground “cheque reported lost” will come within the purview of Section 138 of the N.I.Act. The limitations are provided in the above dictum. Therefore, the refusal on the part of the bank to honour the cheque would not bring the matter within the penal provisions of Section 138 of the N.I. Act.

11. In this backdrop, I have perused the document furnished by the first respondent in the trial court. Ext.P1 is the disputed cheque. It was returned by the bank as per Ext.P2 memo. In Ext.P2, State Bank of Travancore, Nellimoodu branch reported on 25.08.92 as the “cheque

reported lost". Ext.P3 is the intimation received from the State Bank of Travancore, Nellimoodu branch. Ext.P4 is the debit advice. After receiving Ext.P2 dishonour memo, first respondent made a demand for the payment of the said amount of money by giving a notice in writing and Ext.P5 is the copy of the lawyer notice. Ext.P6 is the postal receipt. Ext.P7 is the acknowledgment card. Ext.P8 is the reply. In Ext.P8 also the revision petitioner contended that the cheque was lost earlier. 1st respondent also produced Ext.P9, P10 and P11. Ext.P10 is the copy of ledger proved by the first respondent. The learned counsel appearing for the first respondent submits that there was insufficient fund in the account of the revision petitioner from the year 1985 onwards, which was proved through Ext.P10, the extract of the ledger. Even though such a contention was raised, the original reason stated in Ext.P2 was that cheque was dishonoured on the ground "cheque reported lost". If that be the position, no penal consequence will follow as per Ext.P2 intimation. This position was not considered by the trial court. Therefore,

the conviction and sentence passed by the court below is liable to be set aside.

In the result, the conviction and sentence passed by the courts below under Section 138 of the N.I. Act is set aside and this criminal revision petition is accordingly allowed.

STK

**P.D. RAJAN,
JUDGE**