

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 15TH DAY OF JANUARY 2015/25TH POUSHA, 1936

Crl.Rev.Pet.No. 878 of 2004 (D)

**-----
CRA 125/2002 of SESSIONS COURT,KOZHIKODE
ST 556/1999 of CHIEF JUDICIAL MAGISTRATE COURT, KOZHIKODE
=====**

REVISION PETITIONER/APPELLANT/ACCUSED::

**P.K.ABDUL LATHEEF, S/O. ABDULLAKOYA
AGED 52 YEARS, PULIKKALAKAM, KALLAI
CALICUT-3.**

BY ADV. SRI.SUNNY MATHEW

RESPONDENTS/RESPONDENTS/COMPLAINANT AND STATE::

**1. M/S. HARIS AND COMPANY
13/630, BIG BAZAR, CALICUT-1
REPRESENTED BY ITS PARTNER
SHELOOB SAMAD, S/O.LATE ABDUL SAMAD.**

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

R1 BY ADV. SRI.P.V.KUNHIKRISHNAN

R2 BY PUBLIC PROSECUTOR SRI. K.K.RAJEEV

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15-01-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

SD

K.RAMAKRISHNAN, J

Crl.R.P.No.878 OF 2004

Dated this the 15th day of January, 2015

O R D E R

Accused in ST.No.556/1999 on the file of the Chief Judicial Magistrate, Kozhikode is the revision petitioner herein.

2. The case was taken on file on the basis of a private complaint filed by the first respondent – complainant against the revision petitioner alleging offence under section 138 of the Negotiable Instruments Act (herein after called the Act).

3. The case of the complainant in the complaint was that the complainant is a partnership firm represented by its partner evidenced by Ext.P1 partnership deed and authorised as evidenced by Ext.P2 Power of Attorney, the partner had filed the complaint. The revision petitioner used to purchase articles from their shop and in discharge of that liability, he had issued Ext.P3 cheque, which when presented was dishonoured for the reason funds insufficient evidenced by Ext.P4 dishonour memo, and that was intimated to the complainant by their banker evidenced by Ext.P5 debit slip. The complainant issued Ext.P6 notice vide Ext.P6(a) postal receipt and the same was returned with endorsement unclaimed. He had not paid the amount. So he had committed the offence punishable under section 138 of the Act. Hence the complaint.

4. 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, PW1 was examined and Exts.P1 to P8, P6(a), P8(a) and P8(b) were marked on his side. After closure of the complainant's evidence, revision petitioner was questioned under section 313 of the Code of Criminal Procedure (hereinafter called the Code) and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he had no transaction with the complainant and he had borrowed a sum of Rs.5000/- from one Saheer and given a blank signed cheque and misusing the same, the present complaint had been filed and he had not received the notice also. In order to prove his case, Dws 1 and 2 were examined and Exts.D1 to D6 were marked on his side. After considering the evidence on record, the court below found the revision petitioner guilty under section 138 of the Act and convicted him thereunder and sentenced him to undergo simple imprisonment for three months and also to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for one month more. It is further ordered that if the fine amount is realised, Rs.17,000/- be paid to the complainant as compensation under section 357(1) (b) of the Code of Criminal

Procedure. Aggrieved by the same, the revision petitioner filed Crl.Appeal No.125/2002 before the Sessions Court, Kozhikode, and the learned Sessions Judge by the impugned judgment dismissed the appeal, confirming the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed by the revision petitioner - accused before the court below.

5. Heard both sides and perused the records.

6. The counsel for the revision petitioner submitted that there is no proper service of notice and Exts.D1 to D6 produced by him, will go to show that he was not residing in the address in which the notice was issued. He never resided in that house., Further, the summons was not served on him from that address and while he was waiting in the bus stop, summons was entrusted to him by the police by force and thereafter he appeared before the court through a lawyer and further the evidence will go to show that there is no possibility of any transaction between the complainant and the revision petitioner and he had rebutted the presumption. The counsel for the revision petitioner also submitted that the sentence imposed is harsh.

7. On the other hand, the counsel appearing for the first respondent submitted that the evidence adduced on the

side of the complainant and also the witnesses examined on the side of the revision petitioner will go to show that the case against the revision petitioner has been proved and he was residing in that address earlier and he was in the habit of changing the address and that was the reason why the notice was issued in the care of address of his wife where he was residing. So, under the circumstances, according to the learned counsel the concurrent findings of the court below need not be interfered with. Heard the Public Prosecutor also.

8. The case of the complainant in the complaint was that the revision petitioner purchased some articles on credit and issued Ext.P3 cheque in discharge of that liability. The case of the revision petitioner was one of total denial. The revision petitioner's case was that he had borrowed Rs.5000/- from one Saheer and issued a blank signed cheque, which was misused and the present complaint was filed. In order to prove the case of the complainant, the authorised power of attorney of the complainant concern was examined as PW1 and he was the partner of the firm also and he had deposed in support of his case in the complaint. Though he was cross-examined at length, nothing was brought out to discredit his evidence regarding the factum of the revision petitioner taking goods on credit and issuing Ext.P3 cheque in discharge of that liability. He had no

case that Ext.P3 cheque was not issued from the account maintained by him and the signature in Ext.P1 was his. PW1 had categorically stated that the writings in Ext.P3 cheque was also that of the revision petitioner. But, no steps were taken by the revision petitioner to show that the handwriting in Ext.P3 was not that of the revision petitioner. Except the evidence of DW1, there is no acceptable evidence adduced on the side of the revision petitioner to prove that the blank signed cheque said to have been given to one Saheer was misused and the present complaint was filed. He had not taken any steps against the said Saheer for misusing the cheque as well. So, under the circumstances, courts below were perfectly justified in coming to the conclusion that the case of the revision petitioner is not believable and Ext.P3 cheque was issued in discharge of a legally enforceable debt for the amount due from the revision petitioner to the complainant.

9. The other contention raised by the revision petitioner was that he had not received the notice and he was not residing the address in which the notice was issued. It is true that the address in Ext.P7 return notice, will go to show that it was sent in the address namely, Mr.P.K.Abdul Latheef, C/o.Dr.P.P.Rukiya, House No.22/347, Near State Bank of India, Cotton Mill Road, Thiruvannur, Calicut-29 and it was returned

with endorsement intimation given and unclaimed. It was admitted by DW1 that Dr.P.P.Rukiya mentioned in that address is none other than his wife. It is also seen from Exts.P8 and P8 (a) that he had received those postal articles from the house by name Lagoon on a subsequent period which was admittedly the house of Dr.P.P.Rukiya his wife. Probably the addresses mentioned in Exts.D1 to D6 may be his family house and he may be residing in his wife's house and that was the reason why Ext.P7 notice was sent in that address. Further, Exts.P8(a) and P8(b) will go to show that he received the postal articles from the house of his wife where he was residing. It was brought out in the evidence of DWs 1 and 2 that before they shifted to the house by name Lagoon, they were residing in different rented houses and his wife is a Government doctor and she was practising in her house also and there was a name board in that house. This was admitted by DW2. Merely because, Ext.D5 notice was issued in a different address on a subsequent period in 2001 does not mean that he was not residing in the address in Ext.P7 at the time when Ext.P7 notice was issued and Ext.D5 was in the year 2001 and he had appeared in the case in the year 1999 and he had taken a contention that he was not residing in that address. So, probably after this case, he would have shifted his residence in the house mentioned in Ext.D5 and

that may be the reason why the subsequent notice was issued in that address. So, that doesn't mean that he was not residing in the address shown in Ext.P7 at the time when the notice was issued in this case and there was no possibility for Ext.P7 notice served on him as claimed by him. So, under the circumstances, the courts below were perfectly justified in coming to the conclusion that the notice was issued in the correct address in which he was residing at that time though temporarily along with his wife and the notice was returned with endorsement unclaimed after intimation was given. So, under the circumstances, courts below were perfectly justified in coming to the conclusion that notice was issued as proper. He had no case that he had paid the amount covered by the cheque. So, under the circumstances, courts below were perfectly justified in convicting the revision petitioner for the offence under section 138 of the Act and the concurrent findings of the courts below on this aspect do not call for any interference.

10. As regards the sentence is concerned, the trial court had sentenced him to undergo simple imprisonment for three months and also to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for one month more and further ordered that if the fine amount is realised, an amount of Rs.17,000/- be paid to the complainant as compensation under

section 357(1) (b) of the Code of Criminal Procedure and this was confirmed by the appellate court.

11. In the decision reported in **Damodar S.Prabhu V. Sayed Babalal.H. [JT 2010(4) SC 457]** the Supreme Court has held that the cases under section 138 of the Negotiable Instruments Act are basically of civil nature and the intention of the legislature is to make the drawer of the cheque to pay the amount and not to send him to jail. It is true that severe punishment has been provided for issuing the cheque in the business society without sufficient fund in the account and this was to avoid such acts in the business world. Further, the same view has been reiterated in the decision reported in **Kaushalya Devi Massand V.Roopkishore [AIR 2011 SC pg.2566]**. So, considering the fact that court below has imposed Rs.20,000/- as fine, this court feels that the substantive sentence of three months imprisonment imposed by the court below appears to be excessive and reducing the same to imprisonment till rising of court and directing the entire fine amount is to be paid to the complainant as compensation will be sufficient and that will meet the ends of justice. So, the sentence imposed by the court below and confirmed by the appellate court are set aside and the same is modified as follows:-

The revision petitioner is sentenced to undergo imprisonment till rising of court and also to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for two months. If the fine amount is realised, the entire fine amount be paid to the complainant as compensation under section 357 (1) (b) of the Code of Criminal procedure. Two months time is granted to the revision petitioner to pay the amount. Till then the execution of the sentence is directed to be kept in abeyance.

With the above modification of the sentence alone, the revision petition is allowed in part. Office is directed to communicate this order to the concerned court immediately.

Sd/-
K.RAMAKRISHNAN, JUDGE

R.AV

//True Copy//

PA to Judge