IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 9TH DAY OF SEPTEMBER 2015/18TH BHADRA, 1937

Crl.Rev.Pet.No. 200 of 2005 ( )

AGAINST THE JUDGMENT IN CRL.A 143/2003 of THE DISTRICT & SESSIONS COURT,THRISSUR DATED 26-04-2004

AGAINST THE JUDGMENT IN ST 3703/1999 of J.M.F.C.-II,THRISSUR DATED 31-01-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

P.C.CHACKO, S/O.CHERIYAN, PATHALIL HOUSE,
PALACHODE P.O., MALAPPURAM DISTRICT.

BY ADV. SRI.S.RAJEEV

RESPONDENT(S)/RESPONDENTS/COMPLAINANT:
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1. ABDUL RASHEED, S/O.MUHAMMED MASTER, NJAMANAKKAD P.O., THRISSUR DISTRICT, (REPRESENTS AS MANAGER, MEGHA STAR KURIES AND LOANS PVT. LTD. THRISSUR TOWN).

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

R2 BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS.

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

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K.HARILAL, J.

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Crl.R.P. No.200 of 2005

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Dated this the 9th day of September, 2015.

<u>O R D E R</u>

This Revision Petition is filed challenging the concurrent findings of conviction entered and the sentence imposed on the Revision Petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') in Criminal Appeal No.143/03 on the files of the Sessions Judge, Thrissur. The above appeal was filed challenging the judgment, whereby the Revision Petitioner was found guilty of the said offence, passed in S.T.No.3703/99 on the files of the Judicial First Class Magistrate's Court-II, Thrissur. According to the impugned judgment, the Revision Petitioner stands sentenced to undergo simple imprisonment for one day till rising of the court and to pay a compensation of Rs.1,10,000/- to the complainant with a default sentence of three months.

2\. The complainant's case is that, the accused is a subscriber in a chitty run by the complainant and he auctioned the chitty and received the chitty amount. Thereafter, he defaulted the payment of instalments and on demand to clear off the dues, the accused had drawn and issued Ext.P1 cheque for the said amount of Rs.81,350/- to the complainant. When he presented the cheque for encashment, the same was returned for want of sufficient funds in the account of the accused. Though he caused to issue a lawyer's notice demanding the cheque amount, the accused did not pay the cheque amount; but, sent a reply with false allegations against the complainant.

3. To discharge the initial burden, the litigation clerk of the complainant company has given evidence as P.W.1 and Exts.P1 to P14 were marked. After analysing the evidence on record, the courts below concurrently found that the complainant had successfully discharged the initial burden to prove the execution and issuance of the cheque and thereby the presumptions under Sections 139 and 118(a) of the N.I. Act would stand in favour of the complainant.

4. To rebut the said presumptions, the accused was examined as D.W.1 and Ext.D1 was marked. During the cross-examination of the complainant, some questions were put to him alleging that the accused did not subscribe any chitty or kuri and it was also suggested that he had subscribed to the tickets in the name of other persons including the accused and he signed the documents as if he would be a surety to the kuri transaction. It was again suggested that one P.O.Thomas had obtained blank signed cheques from the accused for security against the company and that was misused. Thus, virtually, in defence, he admitted that Ext.P5 cheque was issued by him, though it was originally a signed blank cheque. It was also admitted that it was given as a security on behalf of the said Thomas and the said Thomas had executed the documents in favour of the company on the pretence of security bond. As rightly observed by the appellate court, from the suggestions he admitted that he had signed the cheque. When he was examined as D.W.1, during the chief examination, he has given evidence in

conformity with the above suggestions made to the complainant. After considering the evidence and the contentions raised in defence, the courts below concurrently arrived at a finding that the accused himself admitted the issuance of the cheque as a surety to the complainant for the amount due from the said P.O. Thomas to the complainant under the chitty transaction. After analysing the aforesaid evidence, the courts below concurrently arrived at a finding that the accused miserably failed to discharge the presumptions which stood in favour of the complainant and it was also observed that execution as well as issuance of the cheque stands admitted by the accused himself, though he claims that he was a surety only. There is no illegality or impropriety in the aforesaid finding arrived at by the courts below on the basis of the evidence on record.

5. Initially, the trial court convicted the accused to undergo simple imprisonment for two months and to pay Rs.81,350/- to the complainant and in default, to undergo simple imprisonment for a

further period of two months. In appeal, after re-appreciating the evidence on record, the learned Sessions Judge reduced and modified the imprisonment to simple imprisonment for one day till rising of the court; but enhanced the compensation to Rs.1,10,000/-, with a default sentence of three months. The legality and propriety of the concurrent findings of conviction and sentence are under challenge in this revision petition.

6. Heard the learned counsel for the revision petitioner.

7. Though this revision petition has been filed on various grounds challenging the concurrent findings of conviction and sentence, on the basis of the evidence on record, the learned counsel mainly canvassed the point that the complaint itself was not maintainable under Section 142 of the N.I. Act. The learned counsel further submits that the payee of the cheque is a company by name "Mekha Kuries and Loans Pvt. Ltd., Thrissur". But the complainant claims that he represented the company only as its Manager.

According to the learned counsel, cognizance under Section 142 of the N.I. Act can be taken on a complaint filed either by the payee or the holder in due course of the cheque. But in the instant case, the complainant is one Abdul Rasheed, who is neither the payee nor the holder in due course of the cheque. Even though the notice had been duly served on the complainant/ 1st respondent, he has not chosen to enter appearance in this revision petition. In view of the contentions raised above, the short question to be considered, is whether the complaint was maintainable under Section 142 of the N.I. Act.

8. Going by Section 142 of the N.I. Act, the mandatory language is that notwithstanding anything contained in the Cr.P.C., 1973, no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. According to Section 7 of the N.I. Act, a "payee" is the person named in the instrument, to whom

or to whose order the money is by the instrument directed to be paid. Similarly, according to Section 9, the "holder in due course" means any person, who, for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order], before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

9. Coming to Section 138(b) of the N.I. Act, the statutory mandate is 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] of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

10. On a combined reading of Section 142 and 138 (b) of the N.I. Act, undoubtedly, it can be held that the court below can take cognizance under Section 142 of

the N.I. Act on a written complaint filed either by the payee or by the holder in due course. But, in the instant case, going by the complaint, it is seen that the complainant is one Abdul Rasheed and not the "Mekha Kuries and Loans Pvt. Ltd. Ext.P5 cheque shows that the payee of the cheque is "Mekha Kuries and Loans Pvt. Ltd. Therefore, it can be safely concluded that the complainant in S.T. No.3703/99 is neither the payee nor the holder in due course and the learned Magistrate ought not have taken cognizance against the accused on the basis of the said cheque, when the payee of the cheque was "Mekha Kuries and Loans Pvt. Ltd. In the above view of the matter, I find that the conviction and sentence imposed on the revision petitioner are illegal and unsustainable as the same were entered and imposed respectively on a complaint which was not maintainable under law.

11. Consequently, the conviction entered and the modified sentence imposed on the revision petitioner under the impugned judgments passed by the courts below will stand set aside and the revision petitioner

is acquitted of the offence under Section 138 of the N.I. Act.

This criminal revision petition is disposed of accordingly.

Sd/-
K. HARILAL, JUDGE

okb.