IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 28TH DAY OF MAY 2015/7TH JYAISHTA, 1937

Crl.Rev.Pet.No. 1149 of 2002 (A2)

AGAINST THE JUDGMENT IN CRL.A 241/1996 of I ADDL.SESSIONS COURT, THIRUVANANTHAPURAM DATED 27-05-2002

AGAINST THE JUDGMENT IN ST 712/1993 of C.J.M.COURT, THIRUVANANTHAPURAM DATED 18-07-1996

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REVISION PETITIONER(S)/APPELLANT/ACCUSED:

A.GOMATHY D/O. DHARMARAJA IYER,
PROPRIETRIX, M/S. RAJA DEEP TAILORS AND
READYMADE GARMENTS, T.C.40/533, MADAMALE LANE,
III PUTHEN STREET, FORT, THIRUVANANTHAPURAM.

BY ADVS.SRI.PIRAPPANCODE V.SREEDHARAN NAIR
SRI.S.P.ARAVINDAKSHAN PILLAI
SRI.PIRAPPANCODE V.S.SUDHEER
SMT.RESMI G. NAIR

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

1. M/S. KALA FASHION FABRICS,
PAZHAVANGADI STREET, EAST FORT,
THIRUVANANTHAPURAM - PROPRIETORY CONCERN,
REPRESENTED BY ITS PROPRIETOR R.GIRIDHAR.

2. STATE, REPRESENTED BY THE PUBLIC
PROSECUTOR, OFFICE OF THE ADVOCATE GENERAL,
HIGH COURT BUILDINGS, ERNAKULAM, KOCHI-31.

R1 BY ADV. SRI.R.S.KALKURA
R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 28-05-2015, ALONG WITH CRRP. 1150/2002, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

OKB

K.HARILAL, J.

Crl.R.P. Nos.1149 & 1150 of 2002

Dated this the 28th day of May, 2015.

COMMON ORDER

These revision petitions are filed challenging the judgments in Crl.Appeal Nos.240/1996 & 241/1996 on the files of the I Additional Sessions Court, Thiruvananthapuram, whereby the conviction entered and the sentence imposed on the revision petitioner in S.T.Nos.711/1993 & 712/1993 on the files of the Chief Judicial Magistrate's Court, Thiruvananthapuram stand confirmed.

2. The revision petitioner is the accused in S.T.Nos.711/1993 & 712/1993 on the files of the Chief Judicial Magistrate's Court, Thiruvananthapuram. She was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, the 'N.I. Act') on complaints filed by the first respondent herein. After trial, the learned Magistrate found the revision petitioner guilty of the

said offence and convicted thereunder. In S.T.No.711/1993, she was sentenced to pay a fine of Rs.1,30,000/- and in default to undergo simple imprisonment for three months. In S.T.No.712/1993, she was sentenced to pay a fine of Rs.45,000/- and in default to undergo simple imprisonment for three months. Feeling aggrieved, though she had preferred Crl.A.Nos.240/1996 & 241/1996, after re-appreciating the entire evidence on record, the learned Sessions Judge also concurred with the findings of guilty arrived at by the learned Magistrate against the accused and confirmed the conviction and the sentence as such, in both cases. The legality and propriety of the concurrent findings of conviction and sentence in both cases are under challenge in these revision petitions.

3. The complainant's cases are summarised as follows: The complainant is a proprietary concern dealing in textile goods. The accused is running a tailoring-cum-garment shop under the name and style

"M/s.Raj Deep Tailoring and Readymade Garments". The said shop is running with the help of her brother Parameswaran. She used to purchase textile goods from the first respondent firm. During the period ranging from 31/7/1992 to 5/9/1992 she had purchased garments from the complainant firm and in discharge of the said liability she had issued Ext.P1 cheque dated 28/8/1993 for an amount of Rs.1,25,000/- and Ext.P2 cheque for an amount of Rs.40,000/- respectively, drawn on Manacaud branch of the State Bank of Travancore of which P.W.2 is the Manager. When the cheques were presented for encashment, they were dishonoured and returned for want of sufficient funds. Though the complainant had caused to issue lawyer notices to the accused and the same were acknowledged by her as per Ext.P4 & P5 acknowledgement cards, she did not repay the cheque amount demanded by the notices and thereby the accused has committed the offence punishable under Section 138 of the N.I. Act.

S.T.No.711/1993 was filed alleging the dishonour of Ext.P1 cheque for Rs.1,25,000/-. S.T.No.712/1993 was filed alleging the dishonour of Ext.P2 cheque for Rs.40,000/-.

4. It is the specific case of the revision petitioner/accused in defence that she is not indebted to the complainant for any amount. According to her, she had issued signed blank cheques as security and these were made use of by the complainant in these cases. To prove her case in S.T.No.711/1993, the complainant was examined as P.W.1, the Manager of the bank was examined as P.W.2 and Exts.P1 to P4 were marked. No oral evidence had been adduced by the accused, but Ext.D1 was marked. In S.T.No.712/1993, the complainant was examined as P.W.1, the Manager of the bank was examined as P.W.2 and Exts.P1 to P6 were marked. No oral evidence was adduced by the accused, but Exts.D1 to D3 were marked. After considering the rival contentions, the court below found the accused

guilty of the offence under Section 138 of the N.I. Act on the finding that the complainant has successfully discharged the initial burden of proof. But the accused has failed to rebut the presumption under Sections 139 and 118(a) of the N.I. Act, which stood in favour of the complainant.

5. The learned counsel for the revision petitioner advanced arguments in common, assailing the findings whereby the court below found that the complainant has discharged the initial burden of proving execution and issuance of the cheques in both cases. The learned counsel pointed out that no document pertaining to the original transaction of purchase has been produced before the trial court. So, no inference can be drawn to the extent that there was an existing legally enforceable liability. Secondly, the complainant himself, in cross-examination, admitted that he has received the amount from the accused for the purchase of goods upto 25/8/1993. If that be so, no amount could

have been due from the accused to the complainant during the period ranging from 31/7/1992 to 5/9/1992 for which Ext.P1 & P2 cheques were issued. In short, if he had received amounts upto 25/8/1993, no amount had been due upto 5/9/1992 for the issuance of Exts.P1 & P2 cheques.

6. I have meticulously evaluated this portion of the deposition of the complainant. Going by the deposition, I find that his version is that he had received amounts from the accused upto 25/8/1993 for several purchases intermittently made by the accused. He has no case that he had received the total amount due from the accused upto 25/8/1993. In the absence of such an assertion it cannot be presumed that no amount could have been due from the accused during the period ranging from 31/7/1992 to 5/9/1992. I am of the opinion that the interpretation given by the learned counsel for the revision petitioner to the said deposition of the complainant is far fetched and

strange, which the complainant never intended. Therefore, the said contention will stand rejected. Secondly, it is the case of the revision petitioner that Exts.P1 & P2 cheques were issued as security for different transactions by way of purchase of goods from the shop of the complainant. Thus, the signature in the cheques and issuance of the same are admitted.

7. In Johnson Scaria v. State of Kerala [2006 (4) KLT 290], this Court held that it is not the burden of the complainant in every case, so long as presumption under Section 139 stands to plead, to prove and establish the original transaction/original consideration to discharge the liability in which the cheque is issued. In Devan v. Krishna Menon [2010 (2) KLT 397], this Court held that the admission of signature in a cheque goes a long way to the execution of the cheque and the possession of the cheque goes a long way as to due issuance of the cheque. In I.C.D.S. Ltd. v. Beena Shabeer [2002 (3) KLT 218 (SC)], the Apex

Court held that a cheque given as security for the liability of the accused or for the liability of any person would also fall under the mischief of offence punishable under Section 138 of the N.I. Act. In view of the above decisions, the case set up by the accused herself in defence is unsustainable in view of the law settled by the decisions referred above.

8. The learned counsel for the revision petitioner further canvassed the point that basing on Ext.P1 cheque itself the complainant filed a civil suit for the realisation of the cheque amount from the accused and the said suit was dismissed on merits on various reasons. So, according to the learned counsel, the said judgment and decree dismissing the suit is relevant as the proceedings under Section 138 of the N.I. Act are initiated on the very same cheque. To substantiate the said contention, the learned counsel cited the decision in Mohandas v. Abdul Azeez [2011 (3) KLT SN 145].

9. Per contra, the learned counsel for the

complainant submits that the judgment dismissing the civil suit is not a relevant fact as both proceedings are entirely different and distinct. It is also submitted that the judgment in the said civil suit has not become final as the appeal challenging the said judgment is still pending before this Court.

10. In the decision in Dashrath Roopsingh Rathod v. State of Maharashtra [2014 (9) SCC 129], the Supreme Court held that the complainant can always file a civil suit alleging dishonour of the cheque for recovery of cheque amount wherever the cause of action arises in civil law. In short, the prosecution under Section 138 of the N.I. Act against the accused does not bar the institution of a civil suit and vice versa. However, a judgment in another case between same parties may be relevant in accordance with Sections 41 to 43 of the Indian Evidence Act. But, in a civil suit, for recovery of cheque amount and criminal prosecution under Section 138 of the N.I. Act, the matter in issue is

entirely different and distinct. Similarly, the standard of proof, appreciation of evidence, burden of proof etc. are also entirely different and distinct. Proceedings under Section 138 of the N.I.Act is aimed to prosecute the accused for penal liability, though loss on account of the dishonour of the cheque also can be restored by way of compensation also. But civil suit is intended to realise the cheque amount from the accused. In short, the conditions stipulated in Sections 40 to 43 of the Evidence Act are not satisfied. Therefore, the judgment passed in civil suit is of no consequence at all in criminal prosecution, particularly, when the judgment is pending in appeal.

11. Even though legal notice intimating dishonour of the cheque had been issued and received by the accused, he did not send any reply challenging the demand made under the notice. The failure to send a reply notice speaks volumes. In Gopakumar P. v. B. Anilkumar [2011 (2) KLD 455], this Court held that it is

a very strong circumstance which goes against the accused and the inference is that he is not disputing the demand.

12. The courts below considered Exts.D1 to D3 meticulously and found that no reliance can be placed on those documents to probabilise the defence version or improbabilise the complainant's case. Ext.D1 receipts are issued against the payment in cash. There is nothing to show that those receipts were issued against the payment by cheque. So, the courts below are justified in finding that Ext.D1 series will not be helpful to the accused to prove her case. Ext.D2 are the counterfoils of the cheques issued by the appellant. It is true that some of the counterfoils of Ext.D2 are left blank. As rightly held by the courts below, those blank counterfoils will not give rise to a presumption that corresponding cheques were left blank when they were issued, particularly, when Ext.D2 come from the custody of the accused himself. Ext.D3

is the details of the cheques issued by the appellant and it is proved by P.W.2. But P.W.2 had admitted in cross-examination that the cheques shown in Ext.D3 were not encashed in accordance with the serial number. As rightly observed by the courts below, if post dated cheques are issued by the account holder, such cheques will reach the bank only after the date put on the said cheques. So, it is not necessary that the cheques should be encashed in their chronological order. Thus, the courts below are fully justified in rejecting the defence set up on Exts.D1 to D3. There is no illegality or impropriety in any of the findings whereby the courts below found the accused guilty of the offences alleged against her in both cases. I do not find any perversity in the appreciation of evidence.

13. In view of the nature and gravity of the offence, I find that the revision petitioner can be given some time to pay the fine amount. Consequently,

in both revision petitions, the revision petitioner is given three months time to pay the fine amount and the default sentence will come into operation only after the said period.

These revision petitions are disposed of with the above modification.

Sd/-

K. HARILAL, JUDGE

okb.