

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 1251 of 2005 ()

**AGAINST THE JUDGMENT IN CRL.APPEAL 150/2002 of ADDL.SESIONS COURT,
KOZHIKODE**

AGAINST THE JUDGMENT IN CC 351/1999 of J.M.F.C.-V, KOZHIKODE

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**SHIJU K.
S/O.Dr.K.HARIDASAN,
EDATHIL HOUSE,
EENGAPUZHA, PUTHUPADI
CALICUT.**

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

**1. NALINI,
W/O.LATE MUKUNDAN,
SREEPURI,
BEYPORE P.O., CALICUT.**

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

**R1 BY ADV. SRI.SUNNY MATHEW
R2 BY PUBLIC PROSECUTOR SMT.MADHUBEN**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 26-
11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

STK

(C.R.)

P.D. RAJAN, J.

Crl.R.P.1251 of 2005

Dated this the 26th of November, 2015

ORDER

This revision petition is preferred by the accused against the judgment in Criminal Appeal 150/02 of the 1st Additional Sessions Judge, Kozhikode. Revision Petitioner was accused in C.C.351/99 of the Judicial First Class Magistrate-V, Kozhikode for having committed an offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act'). The complainant's case is that, accused borrowed a sum of Rs.1,17,500/- from the complainant and in discharge of that debt, he issued Ext.P1 cheque. When the cheque was presented for encashment, it was dishonoured for the reason of funds insufficient. The complainant demanded the due amount by giving a notice in writing, but after notice, there was no repayment of the due amount, hence he filed a complaint before Judicial First Class Magistrate, Kozhikode.

2. During trial, complainant was examined as PW1 and his documents were marked as Exts.P1 to P7. The incriminating circumstances brought out in evidence were denied by the accused while questioning him under Section 313 Cr.P.C. Accused did not adduce any defence evidence. The learned Magistrate convicted the accused under Section 138 of the N.I. Act and sentenced to imprisonment for six months. Against that he preferred Criminal Appeal No.150/2002 before 1st Additional Sessions Judge, Kozhikode, where the sentence was modified by the appellate court. Being aggrieved by that he preferred this revision petition.

3. The main contention advanced by the revision petitioner is that part payment of the debt amount under the cheque was paid to the payee and he has not made any endorsement of that part payment in the cheque. Instead of claiming the balance amount, he claimed the cheque amount, which is higher amount than the debt, in such a situation, no offence under Section 138 of the N.I.

Act will be attracted.

4. In reply to the above argument, the 1st respondent admitted that the debt is less than the cheque amount, even though no endorsement is made on the back side of the cheque leaf an offence will attract against the revision petitioner.

5. The question that arise for consideration is that if the debt amount is less than the cheque amount whether any offence under Section 138 will be attracted against the revision petitioner. According to Section 138 of the N.I. Act, where any cheque drawn by a person on an account maintained by him with a bank for payment of any money to another person from, out of that account, for the discharge of any debt or liability, in whole or in part is returned by the bank, on the ground that the amount in that account is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with a bank, such person shall be deemed to have committed an offence

under Section 138 of the N.I. Act. This deemed provision is subject to the statutory condition that 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 such amount by giving a notice in writing to the drawer of the cheque within 30 days (with effect from 06.02.2003) on receipt of information from the bank. If the drawer fails to make payment of due amount within 15 days on receipt of notice, the payee or the holder of the cheque can file a complaint. The facts of the case show that the amount covered by the cheque is bigger than the cheque amount. A reading of the wordings of the Section shows that the cheque should be given in discharge of a debt either in whole or in part or any liability and if the cheque amount is higher than the debt or liability, Section 138 of the N.I. Act would not get attracted.

6. The position of part payment of the cheque

amount has been considered by the Division Bench of this Court in **Joseph Sartho V. Gopinathan and Another (2008(4) KHC 463)**, where it was held as follows;

“Question arose for consideration in this case was whether, when part payment due under a cheque was paid, an offence under S.138 of the Act will be made out or not. There was conflicting decisions of the High Court on this point and thus the matter was referred to the Division Bench for a finality. Court considered certain key issues regarding making of part payment due under a cheque. Court concluded that, if the drawee makes an endorsement regarding the part payment on the cheque and claimed only the balance amount and if it is dishonoured, the offence under S.138 will be made out. Such a pragmatic view was taken, because any person who makes a part payment which may be very small compared to the amount due under the cheque can escape from the liability.”

7. The accepted connotation of interpretation is that penal statute should be considered strictly and in case of doubt, the benefit will go to the accused. The

presumption of law is that a person is innocent until proved guilty. This means that there is always a presumption of innocence in favour of an accused and the burden to prove the case is on the prosecution. That presumption is available to an accused who is prosecuted under Section 138 of the Negotiable Instruments Act, simply because a cheque happened to be dishonoured itself is not a ground to say that the accused has committed an offence. There may be exceptional cases out side the purview of the Section 138. A debt is a liquidated amount of money owed and payable to another in present or in future which is a pecuniary liability recoverable by action in respect of money or demand. Therefore, Section 138 of the N.I. Act shows not only the debt, but also the liability. A cheque have been issued in discharge of a debt wholly or in part or of any liability.

8. Apex court in **NEPC MICON Ltd. V. Magna Leasing Ltd AIR 1999 SC 1952** and **M/s.Dalmia Cement (Bharat) Ltd. V. M/s.Galaxy Traders and**

Agencies Ltd. AIR 2001 SC 676 has explained the position of law regarding strict interpretation of penal statute. Apex court reiterated that even though Section 138 of the N.I. Act is a penal statute, it should be interpreted taking into consideration, the legislative intent. However, in **Rahul Builders V. Arihant Fertilizers & Chemicals 2007(4) KLT 977 (SC)** apex court reiterated the principle and held that the penal provision under section 138 of the N.I. Act ought to be interpreted strictly. Therefore the penal statute must be interpreted strictly and in case of doubt, the benefit should go to the accused.

9. The point that arises in this case is when a part payment of the amount due under a cheque is paid and if the payee or drawee fails to make an endorsement and the holder claims the full cheque amount whether any offence under Section 138 of the N.I. Act will be attracted in this context. Normally, admissions are not conclusive proof of the matters admitted, but they may operate as

estoppel and one can prove that it was made under mistake of law or fact or under threat or inducement. In the absence of such proof of threat or inducement or mistake of law, admission made by persons constitutes good evidence against the party making it. Thus when there was no material to show that the admission made by the complainant is not in another transaction such admission is valuable in connection with the transaction in this case. In this context, I have examined the evidence of PW1, who is the complainant in this case. His evidence shows that Ext.P1 was issued in discharge of a debt of Rs.1,17,500/-. When it was presented for encashment, it was dishonoured for the reason of funds insufficient. Ext.P2 is dishonour memo, Ext.P3 is the pay in slip, Ext.P4 is the intimation, Ext.P5 is the lawyer notice, Ext.P6 is the acknowledgement card and Ext.P7 is the attested extract of the account of the accused. During cross-examination, PW1 admitted that before institution of the complaint, he received Rs.35,000/- (Rs.25,000/- on 2.11.98 and

Rs.10,000/- on 29.12.98). Revision petitioner also paid Rs.10,000/- and the balance debt amount is only Rs.72,500/-. In Ext.P5 lawyer notice the amount claimed is Rs.82,500/-, then the impact of the admission and the failure of the maker or holder of the cheque making endorsement of the part payment was not considered by the courts below. An admission is a voluntary acknowledgment made by one party in legal interest of the existence of certain facts which are relevant to the fact in issue in a case. The important characteristic of this evidence is that it is in the style of binding nature. When an admission is made by a party during proceeding of a case, it is fully binding on that party which is a judicial admission.

10. An indorsement on the back or face of the instrument is valid under Section 15 of the N.I. Act, when the maker or holder of a negotiable Instrument signs the same. If the signature on the back side of the instrument or on the face of the instrument is made by a third party,

neither the maker nor the holder made any indorsement within the meaning of the Section. Section 15 of the N.I. Act reads as follows;

“When the maker or holder of a negotiable instrument signs the same, otherwise than such as maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the “indorser”.

Therefore, a promissory note, bill of exchange or a cheque can be negotiated by making an indorsement either on the instrument or on a separate paper annexed to it.

11. The indorsement for part payment of the cheque was explained under Section 56 of the N.I. Act. According to Section 56 of the Negotiable Instruments Act, “no writing on a negotiable instrument is valid for the purpose of negotiation, if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid

a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.” The sections prohibit the transfer of an instrument for a portion of the amount due under it. But the last portion says that if the amount has been paid in part, the fact of the part payment may be endorsed on the instrument and negotiated for the balance amount. When the maker of the payment makes a part payment, but that amount is not endorsed and the note is fraudulently negotiated by the payee without admitting the part payment, the maker has to pay the full amount of the instrument to the holder. When court considers part payment due under a cheque and if drawee makes an endorsement regarding the part payment on the instrument and he claims the balance amount by presenting the cheque for encashment through a bank and if it is dishonoured, then an offence under Section 138 of the N.I. Act will be made out. Both the courts below failed to appreciate the admission made by PW1 and the documentary evidences which resulted in

miscarriage of justice. Therefore, this is a fit case to exercise revisional jurisdiction. While invoking revisional jurisdiction, this court can rectify the illegalities committed by the inferior courts. The object of conferring such power is to correct grave miscarriage of justice arising from erroneous orders.

12. In **Angu Parameswari Textiles (P) Ltd. and Others V. Sri. Rajam and Co. 2001 Company Cases Vol.(105) 186**, Madras High Court held that;

“For the purposes of Section 138 of the Negotiable Instruments Act, 1881, the cheque should be towards the discharge of either the whole debt or part of the debt. If the cheque is for more than the amount of the debt due, Section 138 cannot be attracted.”

Here the portion of the cheque was repaid and such payment is admitted by PW1 and no endorsement was made on the back of the cheque or face thereof and on prosecution complainant claimed cheque amount, no offence under Section 138 of the N.I. Act is made out. The

evidence adduced in this case is not sufficient to convict the accused under Section 138 of the N.I. Act.

In the result, the conviction and sentence passed by the court below under Section 138 of the N.I. Act are set aside and revision petitioner is acquitted and set at liberty.

STK

//TRUE COPY//

P.A. TO JUDGE

Sd/-
P.D. RAJAN,
JUDGE