IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

MONDAY, THE 13TH DAY OF JULY 2015/22ND ASHADHA, 1937

Crl.Rev.Pet.No. 1220 of 2009 ( )

AGAINST THE JUDGMENT IN CRA 534/2004 of ADDL. SESSIONS COURT, FAST TRACK - II, PALAKKAD

AGAINST THE JUDGMENT IN ST 343/2000 of C.J.M. PALAKKAD

REVISION PETITIONER(S)/APPELLANT/ACCUSED:
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1. **M/S. FAISAL CHITS (COIMBATORE) PVT. LTD.,**
   REGISTERED OFFICE 8/450, PALAKKAD MAIN ROAD,
   KUNIYAMUTHUR, COIMBATORE-8, TAMIL NADU
   REP. BY MANAGING DIRECTOR SYEDALI.

2. **SYEDALI,**
   MANAGING DIRECTOR, FAISAL CHITS (COIMBATORE) PVT. LTD.,
   FAISAL HOUSE, NURANI POST
   PALAKKAD.

3. **MOHAMMED HANEEFA S/O. SYEDALI,**
   DIRECTOR, FAISAL CHITS (COIMBATORE) PVT. LTD.
   FAISAL HOUSE, NURANI POST, PALAKKAD.

   BY ADV. SRI.K. ABDUL JAWAD

RESPONDENT(S)/COMPLAINANT:
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1. **STATE OF KERALA, REPRESENTED BY**
   PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM.

2. **P.A.MUBARAK S/O. ABDUL AZEEZ,**
   8/632, DPO ROAD, WEST YAKKARA,
   PALAKKAD.

   R1 BY PUBLIC PROSECUTOR SMT.SAREENA GEORGE
   R2 BY ADV. SRI.NIREESH MATHEW

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13-07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

STK

P.D. RAJAN, J.

C.R.R.P.No.1220 of 2009

Dated this the 13th day of July, 2015

ORDER

The revision petitioners are the appellants in Crl. Appeal 534/04 on the file of the Additional Sessions Judge, Fast Track Court-II, Palakkad challenging the judgment of conviction for offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred to as the 'Act'). They were accused in S.T.343/2000 of the Chief Judicial Magistrate Court, Palakkad and convicted under Section 138 of the Negotiable instrument Act, the first revision petitioner was sentenced to pay a fine of ₹1000/-, the 2nd and 3rd petitioners were sentenced to undergo simple imprisonment for three months each and pay a fine of ₹2,10,000/- each in default of payment of fine, simple imprisonment for 3 months. It was directed that if the fine amount is realised, ₹4,20,000/- will be paid to the second respondent as compensation. The revision petitioners and two others are accused and the second respondent is the complainant.

2. The facts necessary for indictment were that the complainant was a subscriber in a chitty conducted by the first accused. On 17.01.2000, he bid the chitty for a sum of Rupees 4 lakhs, for the due amount first accused issued a cheque dated 16.02.2000 drawn on Dhanalakshmi Bank, which was signed by the 3rd accused, who is the Director of Faisal Chits. On. 02.03.2000, the cheque was presented for encashment, it was dishonoured for the reason ‘fund insufficient’. Complainant demanded the amount by giving a notice in writing. The notices issued to A1, A4 and A5 were returned unclaimed and notices sent to the other accused were received. Even after receipt of the notice, there was no payment, on the other hand, they sent a reply notice. In the circumstance, a complaint was filed in the Chief Judicial Magistrate Court, Palakkad.

3. For substantiating the allegation, the de-facto complainant was examined as PW1 and his documents were marked as Ext.P1 to P12. The incriminating

circumstances brought out in evidence were denied by the accused while questioning them. They examined DW1 and 2 in support of their defence contention and marked Exts.D1 to D8. The trial court after analysing the evidence acquitted A4 and A5 and convicted the accused No.1 to 3 under Section 138 of the Negotiable Instruments Act and sentenced thereunder. Against that judgment, A1 to A3 preferred criminal appeal 534/04.

4. The learned counsel appearing for the revision petitioner contended that the cheque was issued not in discharge of a legally enforceable debt. If the second respondent's evidence is admitted, he paid only less than 1,65,000/- towards chitty transaction and he failed to pay the balance instalment thereafter. The courts below failed to appreciate that position. The sentence imposed by the courts below was very high and they prayed for modification.

5. While exercising revisional jurisdiction, this court can examine the records of the inferior criminal courts for the purpose of satisfying itself to the correctness, legality

or propriety of the findings. The apex court in **Pratap V. State of U.P. 1973 SCC (Crl.) 496** held that:

> "The object of conferring revisional power on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct the grave failure or miscarriage of justice arising from the erroneous or defective orders. The error or a defect may arise from the misconception of law, irregularity of procedure, misreading of evidence, misapprehension or misconception about law or facts, mere perversity or undue hardship of leniency."

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 bank 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 liability, is returned by the bank, 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 a 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 such amount 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.

7. For this, I have ascertained the oral evidence of PW1, who is the de-facto complainant in the trial court. His evidence shows that he was a subscriber to the chitty in the first respondent’s company for a sum of Rs.5 lakhs, on 17.01.2000, he bid the chitty for Rs.4 lakhs and in discharge of that liability, the 3rd revision petitioner has issued Ext.P1 cheque. When it was presented for encashment, it was dishonored for the reason, 'funds insufficient'. Ext.P2 and P3 are the dishonour memos. Ext.P4 is the memo issued from Dhanalakshmi Bank. The

second respondent issued a lawyer notice demanding the due amount. Ext.P5 is the copy of the lawyer notice. Ext.P6 series are the postal receipts. Ext.P7 is the acknowledgement card. Ext.P8 series are returned notices. After receipt of notice, they sent a reply notice denying the transaction. PW1 also produced Ext.P10, P11 and P12 to prove the chitty transaction. Analysing the evidence in Ext.P1, the trial court was of the view that Ext.P1 was issued in discharge of a legally enforceable debt and it was dishonoured for the reason of funds insufficient.

8. Section 139 of the Negotiable Instruments Act reads as follows.

> "139. Presumption in favour of the holder - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability".

When complainant proves the existence of a legally enforceable debt, the presumption under Section 139 of the Negotiable Instruments Act starts operating and burden shifts to the accused. A three Judge bench of the Apex Court in **Rangappa V. Sri Mohan (2010(11) SCC 441)** held as follows:-

> "The presumption mandated by Section 139 includes a presumption and there exists a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or lliability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant".

9. When the holder of the cheque received the cheque of the nature referred under Section 138 of the N.I. Act for discharge of a debt for whole or in part or in other liability, the presumption under Section 139 of the N.I. Act will automatically attract. There are also presumptions under Section 118 of the N.I. Act. To rebut the presumption under Section 139 of the N.I. Act, revision

petitioners were examined as DW1 and DW2 in the trial court and marked Ext.D1 to D8. DW1 was the Junior Assistant of Registrars of Chitties, Coimbatore and DW2 is a Director of first revision petitioner company. While questioning under Section 313 Cr.P.C., the revision petitioners contended that second respondent was not a subscriber to chitty No.48/96-A and there is no legally enforceable debt. The 5th accused who was acquitted by the trial court was the proprietor of Fathima Jewellery, from that shop second respondent purchased gold ornaments on credit basis. The 3rd accused is the friend of the second respondent and he demanded the 3rd revision petitioner to pay 4 lakhs amount to one Settu. As per that request, he issued a cheque to its correspondent. Even though DW1 and 2 were examined in the trial court, the oral and documentary evidence adduced by the revision petitioners were not sufficient to discharge the initial burden cast upon them. Therefore, the trial court presumed that Ext.P1 cheque was issued in discharge of a legally enforceable debt. The courts below considered the decisions of Apex court reported in **Hiten P. Dalal v. Bratindranath Banerjee (AIR 2001 SC 3879, Beena v. Muniappan (AIR 2001 SC 2995) and Narayana Menon v. State of Kerala 2006 (3) KLT 404 (SC).** Therefore, accepting the law settled by the apex court, the initial burden upon the revision petitioners to rebut the presumption was not properly discharged and the trial court convicted the revision petitioners. I find no illegality in the findings.

10. The appellate court confirmed the findings of the trial court and sentenced the first revision petitioner company to a pay a fine of ₹1000/-. The 2^{nd} and 3^{rd} accused were also sentenced to simple imprisonment for 3 months each and pay a fine of ₹2,10,000/- each, in default, to undergo simple imprisonment for 3 months. It was also directed, if fine amount is realized, a sum of ₹4,20,000/- will be paid to the second respondent as compensation under Section 357(1) (b)of Cr.P.C. The appellate court observed that the sentence awarded by the court below is very reasonable and there is nothing to

interfere in that aspect also. The learned counsel appearing for the revision petitioner submitted to modify the sentence. This court in **M/s.Target Overseas Exports Pvt. Ltd. V. A.M. Iqbal (2005 Cri.L.J.1931)** this Court held that, sentence to undergo imprisonment till the rising of the court and compensation under Section 357(3) Cr.P.C. is sufficient to meet the ends of justice.

In the circumstance, the conviction under Section 138 of the Negotiable Instruments Act is confirmed, but the sentence is modified as follows;

a) The first accused Company is sentenced to pay a fine of ₹1000/- (Rupees One thousand only) under Section 138 of the Negotiable Instrument Act is confirmed.

b) The 2nd and 3rd accused are sentenced to imprisonment till rising of court under Section 138 of the Negotiable Instrument Act and to pay a compensation of ₹2,10,000/- (Rupees Two lakhs and ten thousand only) each as compensation under Section 357 (3) of Cr.P.C.

c) If the compensation amount is realized, it shall be disbursed to the second respondent. Each of them deposited Rs.80,000/- in the Chief Judicial Magistrate Court, Palakkad as directed by this court, which will be adjusted towards the compensation. They are directed to deposit the balance amount within 30 days from today, failing which, Chief Judicial Magistrate, Palakkad is directed to issue Non-bailable Warrant.

This revision petition is partly allowed.

Sd/-
P.D. RAJAN,
JUDGE

STK

//TRUE COPY//

P.A. TO JUDGE