

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

Crl.Rev.Pet.No. 2219 of 2009 ()

Crl.A 339/2008 of ADDL.SESIONS COURT (ADHOC)-II, MANJERI
ST 244/2006 of J.M.F.C.-II, PARAPPANANGADI

REVISION PETITIONER(S)/PETITIONER/APPELLANT/ACCUSED:

C.P.ABDUL RASAK, S/O. ABOOBACKER HAJI,
CHEERANTE PURAKKAL, NEAR THONDALAYIL HOUSE, PUTHUKULAM
CHETTIPPADI POST, VIA. PARAPPANANGADI
TIRURANGADI-TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI.K.K.MOHAMED RAVUF

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

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1. P.GANGADHARAN, S/O. GANAPATHI,
PULIYERI HOUSE, PUTHARIKKAL P.O., PARAPPANANGADI
TIRURANGADI TALUK, MALAPPURAM DISTRICT.
 2. THE STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.K.T.SHYAMKUMAR
R1 BY ADV. SRI.HARISH R. MENON
R2 BY PUBLIC PROSECUTOR, SHRI.V.S.SREEJITH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
10-12-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.R.

B.SUDHEENDRA KUMAR, J.

Crl.R.P. No.2219 of 2009

Dated this the 10th day of December 2015

O R D E R

The accused in S.T.No.244 of 2006 on the files of the Court of the Judicial Magistrate of First Class, Parappanangadi has filed this revision petition challenging the concurrent finding of conviction and sentence passed by the courts below under Section 138 of the Negotiable Instruments Act (for short 'the N.I. Act).

2. Heard.

3. The prosecution allegation is that the revision petitioner issued Ext.P1 cheque in favour of the complainant towards the discharge of his liability to the

complainant. The complainant presented the said cheque for encashment. However, the same was dishonoured due to insufficiency of funds in the account of the revision petitioner. Statutory notice was received by the revision petitioner.

4. Before the trial court, PW1 was examined and Exts.P1 to P5 were marked for the complainant. DW1 was examined and Exts.D1 and D2 were marked for the revision petitioner.

5. PW1 had given the evidence in tune with the contentions in the complaint. The learned counsel for the revision petitioner has argued that since no notice as contemplated under proviso(b) to Section 138 of the N.I. Act was issued prior to the filing of the complaint, the

conviction and sentence passed by the courts below, cannot be sustained.

6. The service of notice demanding the cheque amount is necessary for maintaining a complaint. Unless a notice is served in conformity with proviso (b) to Section 138 of the N.I. Act, the complaint cannot be maintainable. One of the conditions to maintain the complaint is service of notice making demand of the payment of the cheque amount. Therefore, the demand for the cheque amount is *sine quo non* to maintain the complaint, as is evident from proviso (b) to Section 138 of the N.I.Act.

7. The Apex Court in **Rahul Builders v. Arihant Fertilizers and Chemical** (2007 (4) KLT 977 (SC)) held in paragraph 10 thus:-

“Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of S.138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to S.138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology “payment of the said amount of money”. Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs

and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law.”

8. A learned Single Judge of this court in **Aramughan v. Sudheesh Kumar** (2009 (2) KLT 481) held that a mere intimation of dishonour of cheque is not sufficient compliance of the demand for payment as contemplated under proviso (b) to Section 138 of the N.I. Act.

9. In **Central Bank of India v. M/s.Saxons Farms** (AIR 1999 SC 3607), the Apex Court held that in the notice prescribed under proviso (b) to Section 138 of the N.I. Act, a demand for payment of the amount of the cheque must be made. It is not necessary that the demand must be by

particular words. There is no form for making the demand. However, the demand must be clear as required under proviso (b) to Section 138 of the N.I. Act. In **Central Bank of India** (supra), the demand was made in the following words:-

“Kindly arrange to make payment to avoid unpleasant action of my client”.

The Apex Court held that the above words would constitute clear demand as required under proviso (b) to Section 138 of the N.I. Act .

10. In this case, Ext.P4 was the statutory notice issued on behalf of the complainant. The contents of Ext.P4 are extracted as follows:-

“Cheque bearing No.014392 dated 2/11-2005
issued by you in favour of Sri.P.Gangadharan,

Puliyeri House, Putharikkal P.O., Parappanangadi, for a sum of Rs.27,000/- (Rupees twenty seven thousand only) has been dishonoured for want of funds. My client Sri.P.Gangadharan has instructed me to issue this notice to inform you of the fact.”

11. It is clear from Ext.P4 that no demand was made in Ext.P4 notice, for payment of cheque amount. There was only an intimation to the revision petitioner with regard to the dishonour of the cheque. Since Ext.P4 is not a notice of demand as contemplated under proviso (b) to Section 138 of the Act, I am of the view that the complaint filed pursuant to Ext.P4 cannot be maintainable. The courts below did not consider this aspect while appreciating the evidence and consequently, the conviction and sentence passed by the courts below cannot be

sustained.

In the result, this revision petition stands allowed, setting aside the conviction and sentence passed by the courts below under Section 138 of the N.I. Act and the revision petitioner is acquitted for the said offence. The bail bond of the revision petitioner stands cancelled and he is set at liberty.

Sd/-
B.SUDHEENDRA KUMAR,
JUDGE

dl/10.12..2015

// True Copy //

PA to Judge