

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937

Crl.Rev.Pet.No. 1051 of 2015

AGAINST THE JUDGMENT IN CRL.A.NO. 353/2012 of I
ADDITIONAL SESSIONS COURT, PALAKKAD DATED 02-04-2014

AGAINST THE JUDGMENT IN ST 2013/2008 of J.M.F.C.,CHITTUR
DATED 25-08-2012

REVISION PETITIONER/APPELLANT/ACCUSED:

DR.O.KANNAPPAN,
MANAGING TRUSTEE CUM SECRETARY,
V.N.PUBLIC HEALTH AND EDUCATION TRUST, DOOR NO.11,
JAWAHAR MAIN ROAD, N.R.T NAGAR, THENI DISTRICT
TAMILNADU, PRESENTLY MANAGING TRUSTEE CUM
SECRETARY,
C.N.PUBLIC HEALTH AND EDUCATION TRUST, WALAYAR,
PALAKKAD DISTRICT.

BY ADV. SRI.P.SANJAY

RESPONDENT/RESPONDENT:

1. G.LALITHAMANI, AGED ABOUT 57 YEARS,
W/O.R.GOVINDARAJ, ALAMARATHOTTAM, R.V.PUTHUR,
ERUTHENPATHI, CHITTUR PALAKKAD DISTRICT,
REPRESENTED BY THE POWER OF ATTORNEY R.GOVINDARAJ.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM 692 031.

R1 BY ADV. SRI.NIREESH MATHEW

R2 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL REVISION PETITION HAVING COME UP
FOR ADMISSION ON 21-08-2015, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No.1051 of 2015

Dated this the 21st day of August, 2015

ORDER

The revision petitioner is the 2nd accused in S.T. No.2013/08 on the files of the Judicial First Class Magistrate's Court, Chittoor, and the 1st respondent is the complainant therein. He was prosecuted for the offence punishable under Sec.138 of the N.I. Act. After trial, the learned Magistrate found the revision petitioner guilty of the said offence and convicted thereunder. He was sentenced to undergo simple imprisonment for six months and to pay a compensation of Rs.15 lakhs to the complainant under Sec.357(3) of the Cr.P.C. and in default, to undergo simple imprisonment for two months. Though he had preferred Crl. Appeal No.353/12 before the Sessions

Court, Palakkad, after re-appreciating the evidence, the learned Sessions Judge also confirmed the conviction and sentence, as such, without any interference. This revision petition is filed challenging the concurrent findings of conviction and sentence on various grounds.

2. The case of the complainant is as follows: The 2nd accused, being the Managing Trustee-cum-Secretary to V.N. Public Health and Educational Trust, borrowed Rs.13.5 lakhs from the complainant on 7/1/2008 and in discharge of the said liability, he has drawn and issued Ext.P1 cheque for the said amount and when the complainant presented the cheque for encashment, the same was dishonoured and returned with the endorsement 'funds insufficient'. Though he caused to issue two lawyer's notices demanding the cheque amount in different addresses, one was returned unserved and the other was received by the staff of the 1st respondent Trust for and on behalf of the 2nd accused. But, the 2nd accused has not paid the

cheque amount and thereby, he has committed the offence punishable under Sec.138 of the N.I. Act. The accused pleaded not guilty of the offence and raised mainly two contentions. Ext.P1 cheque was a blank signed cheque issued in the year 2005 in connection with a property transaction and the same was misused for prosecuting him to get unlawful enrichment. Secondly, it was contended that no notice was duly served to him in compliance with the Sec.138(b) of the N.I. Act and so, the learned Magistrate ought not to have taken cognizance under Sec.142 of the N.I. Act, due to the non-compliance with the statutory mandate under Sec.138(b) of the N.I. Act.

3. Heard the learned counsel for the petitioner and the learned counsel for the 1st respondent.

4. Though this revision petition has been filed on various grounds, the learned counsel for the petitioner mainly focused on the point that no notice was served in compliance with the mandatory requirement under Sec.138(b) of the N.I. Act.

5. Per contra, the learned counsel for the 1st respondent advanced arguments pointing out that notice under Sec.138(b) of the N.I. Act was served properly and the same was proved by the examination of P.Ws.6 and 7.

6. In view of the rival contentions, firstly, the question to be considered in this revision petition is whether the notice under Sec.138(b) of the N.I. Act had been duly served on the 2nd accused in compliance with Sec.138(b) of the N.I. Act.?

7. Going by the judgments under challenge, it is seen that notices were issued in different addresses in Kerala and Tamil Nadu. Admittedly, the notice issued in the address at Walayar, Palakkad was returned with an endorsement 'addressee is absent and returned to the sender'. P.W.2, the Post Master of Walayar Post Office, has testified that the Postman was not able to serve the notice as the 2nd accused was absent in the station. In view of the endorsement in Ext.P7 notice, the Postman who attempted to serve the notice; but

could not serve the notice due to the absence of the accused, was the best witness, rather than the Post Master, who had no direct knowledge as regards the attempts made by the Postman to serve the notice. The Postman of Walayar Post Office is the best witness to speak about the circumstances under which he made the said endorsement in the returned notice; but unfortunately the said Postman was not examined as a witness.

8. As regards the service of notice in the address at Theni, it has come out in evidence that P.W.7 received the notice under Ext.P18 authorisation letter given by P.W.6, to receive the notice. Here, the question is, has the 2nd accused given authorisation letter to P.W.6 to receive the notice for and on behalf of him. In the impugned judgment itself it is observed that authorisation by the 2nd accused in favour of P.W.6 has not been produced from the side of the prosecution. In my view, the authorisation letter, if any, is the best evidence, which would make the

service of notice proper and valid. I am unable to countenance the finding of the trial court that the non-production of the said authorisation letter is not fatal to the case. No doubt, it is fatal to the case of the complainant, particularly when the accused could not get an opportunity to cross-examine P.Ws.6 and 7, in spite of the coercive steps taken against them. It was incumbent upon the trial court to secure the presence of those witnesses before the court as to provide an opportunity to the 2nd accused to cross-examine them. Needless to say, the trial court went wrong by proceeding further without making sure that notice under Sec.138(b) of the N.I. Act was properly served to the 2nd accused. Unless and until the authorisation, if any, given by the 2nd accused to P.W.6 is produced and the 2nd accused is given an opportunity to cross-examine P.Ws.6 and 7, it cannot be held that notice was duly served on the 2nd accused. However, the evidence available on record at present is not sufficient to arrive at a conclusion that notice under

Sec.138(b) of the N.I. Act was duly served on the accused.

9. The service of notice as provided under Sec.138 of the N.I. Act is a mandatory pre-requisite to take cognizance for the offence punishable under Sec.138 of the N.I. Act. According to the proviso to Sec.138 of the N.I. Act, nothing contained in the Section shall apply unless payee or holder in due course of the cheque, as the case may be, makes a demand for payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of receipt of the information by him from the bank regarding the return of the cheque as unpaid and according to Sec.138(b) of the N.I. Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of the offence punishable under Sec.138 of the N.I. Act unless such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Sec.138 of the N.I.

Act. Under Clause (c) of Sec.138 of the N.I. Act, the cause of action arises only when the accused fails to make payment within 15 days from the date of receipt of the notice. On a combined reading of the above provisions, it can be held that cognizance could not have been taken, unless the court made sure that the notice under Sec.138(b) of the N.I. Act was properly served.

10. In the above analysis, the impugned judgments passed by the courts below will stand set aside and the case is remanded to the trial court as to provide opportunity to both parties to adduce further evidence, in view of the above observation, on terms. The petitioner shall deposit half of the cheque amount within a period of three months from today. On compliance with the said condition, within the time specified above, the trial court shall restore the complaint on the files and proceed in accordance with law. Needless to say, in case the 2nd accused fails to comply the aforesaid condition, the impugned

judgments will stand in force. The trial court shall pass final judgment after providing opportunity to both parties to adduce further evidence, within a period of three months from the date of receipt of a copy of this order. In view of the remand due to lack of evidence as regards statutory pre-requisite to take cognizance, there is no need to consider merits of the case.

This revision petition is disposed of accordingly.

Sd/-
(K. HARILAL, JUDGE)

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P.S. to Judge