

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

MONDAY, THE 6TH DAY OF APRIL 2015/16TH CHAITHRA, 1937

Crl.Rev.Pet.No. 1573 of 2014 ()

AGAINST THE JUDGMENT IN CRA 467/2012 of THE COURT OF ADDL. DISTRICT
& SESSIONS JUDGE-IV, THIRUVANANTHAPURAM DATED 11.7.2014

AGAINST THE JUDGMENT IN CC 126/2009 of THE COURT OF JUDICIAL FIRST
CLASS MAGISTRATE-V (SPECIAL COURT FOR MARKLIST CASES),
THIRUVANANTHAPURAM DATED 15.9.2012

REVISION PETITIONER/APPELLANT/ACCUSED:

ISSAC K.J, AGED 61 YEARS
S/O JOSEPH K.E., T.C.26/1596(3),
NEAR NEW MUBARK HOTEL
STATUE, THIRUVANANTHAPURAM.

BY ADV. SRI.SANU.S.PANICKER

RESPONDENTS/RESPONDENTS/COMPLAINANT AND STATE:

1. REGHUNATHAN CHETTIAR
NJERAVILA VEEDU, T.C.NO.66/1764, KOLIYOOR
MUTTAKADE P.O., THIRUVANANTHAPURAM-695001.

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

R1 BY ADV. SRI.G.S.REGHUNATH
R2 BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
06-04-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.R.P.No.1573 of 2014

Dated 6th April, 2015

ORDER

This revision petition is filed against the conviction concurrently entered against the revision petitioner for the offence under Section 138 of the Negotiable Instruments Act, 1881 (in short 'N.I. Act'). The revisionist was the accused in C.C.No.126 of 2009 before the Court of Judicial First Class Magistrate-V, Thiruvananthapuram and the first respondent herein was the complainant therein. The trial court found the revision petitioner guilty and convicted him under Section 138 of the N.I. Act and sentenced him to undergo simple imprisonment for a period of 15 days and to pay a fine of 1,50,000/-. In case of default in payment of fine he was ordered to undergo simple imprisonment for a further period of 15 days. The amount of fine on remittance was directed to be paid to the complainant as compensation under Section 357(1) Cr.P.C. Aggrieved by the same the revision petitioner preferred Crl.A.No.467 of 2012. The appellate court on a careful evaluation of the evidence found the contentions raised by the revision petitioner as meritless and consequently, confirmed the conviction entered against

him by the trial court under Section 138 of the N.I. Act. However, the sentence imposed on him therefor, was modified. The substantive sentence imposed by the trial court was modified as sentence to undergo imprisonment till rising of the court. The sentence to pay fine imposed by the trial court was maintained by the appellate court. At the same time, the default sentence was interfered with and in place of the order to undergo simple imprisonment for a period of 15 days the appellate court directed him to undergo simple imprisonment for a period of three months in case of failure to pay the amount of fine. The order to pay the amount of fine, on realisation, as compensation to the complainant was also maintained by the appellate court. This revision petition is filed in the said circumstances.

2. I have heard the learned counsel for the revision petitioner, the learned counsel for the first respondent and also the learned Public Prosecutor.

3. As is obvious from the facts expatiated earlier conviction was concurrently entered against the revision petitioner under Section 138 of the N.I. Act. When that be the position, to make this Court to invoke the revisional jurisdiction the revision petitioner has to make out

a case of utter perverse appreciation of evidence by the courts below. It is also permissible to invoke the revisional jurisdiction in case the findings are based on no evidence or suffering from any error of law. The learned counsel appearing for the revision petitioner attempted to canvass the position that the impugned judgment is an outcome of utter, perverse appreciation of evidence. It is contended that the courts below had not considered the question raised by the revision petitioner that the execution of the cheque in question was not proved by the complainant and therefore, the benefit of the presumption under Section 139 was not available to the first respondent/complainant. Yet another contention of the revision petitioner is that the defence evidence was not properly appreciated by the courts below. Above all, it is contended that no proper statutory notice was given in writing by the complainant/first respondent inasmuch as Ext.P3 lawyer notice was issued beyond the statutorily prescribed period. In case of failure to issue the notice within the statutorily prescribed time limit it would strike at the root of the matter and would vitiate the very prosecution itself and hence I think it only appropriate to consider firstly the said contention. For considering the said contention in an appropriate manner a glance at Section 138 of the Negotiable Instruments Act, bearing in mind the date of receipt of information from the bank regarding the return of the cheque as unpaid and the date on which the statutory notice was made in writing, is

inevitable. There is no dispute with respect to the date of receipt of information from the bank regarding the return of the cheque as unpaid, as is evident from Ext.P2 dated 26.5.2009. The specific case of the first respondent/complainant is that Ext.P3 registered lawyer notice was sent by post on 25.6.2009 and to substantiate the same Ext.P4 postal receipt was produced besides deposing in tune with the same. Section 138 of N.I. Act reads thus:-

"138. Dishonour of cheque for insufficiency, et., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker 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 other liability, is returned by the bank unpaid, 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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
- (b) the payee or the holder in due course of the

cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

4. Ext.P1 cheque dated 31.3.2009 issued by the revision petitioner was bounced on presentation for encashment by the first respondent and Ext.P2 dated 26.5.2009 is the information from the bank regarding the return of the cheque as unpaid received by the complainant/first respondent. Ext.P4 postal receipt containing the signature of the accused/addressee is a proper despatch of the material on the address therein and in fact, the revision petitioner did not have a case of non-receipt of Ext.P3 lawyer notice and his case is that it was given after the prescribed time limit under proviso (b) to Section 138 of the N.I. Act and there was no proper statutory notice. A scanning of proviso (b) to Section 138 of N.I. Act would reveal that the prescription of time limit is for making a demand for the payment of the amount of money covered by the cheque by giving a notice in writing and the said time limit is not one with respect to the receipt of such a notice. There

can be no doubt with respect to the position that giving is the process of which receipt is the accomplishment. Therefore, if a payee or the holder in due course of the cheque established the despatch of notice on the correct address of the drawer, pursuant to the dishonour of the cheque, before the expiry of the period of 30 days it would satisfy the statutory requirement of demand by giving notice within the statutory period. (See the decisions of this court in **K. Madhu v. M/s. Omega Pipes Ltd., Ernakulam** (1994 Crl.L.J. 3439) and **Syed Hamid Bafaky v. Moideen** (1996 Crl.L.J. 1013). A favourable presumption, in such circumstances, is available under Section 27 of the General Clauses Act, 1867 and in case of non-receipt of such a notice it is for the drawer of such cheque to establish the same. Revert back to the aforesaid question evidently, in this case, the contention of the revision petitioner/accused who admits its receipt is that Ext.P3 lawyer notice was not given within the statutorily prescribed period of 30 days computing it from 26.5.2009 as Ext.P4 would reveal that it was sent only on 25.6.2009. In the context of the said contention it is relevant to note that the cause of action for making a demand for the payment of the amount of money covered by the cheque concerned by giving a notice in writing to the drawer of the cheque would arise only on receipt of information by the payee or the holder in due course of a cheque, from the bank regarding the return of the cheque as unpaid. It is common

case that the said date is 26.5.2009. The question is whether for the purpose of computing the period of limitation for the purpose of proviso (b) to Section 138 of N.I. Act 26.5.2009 could be excluded or not ? If the answer is in the affirmative there would be proper notice under the said provision in the case on hand. While the learned counsel for the revision petitioner contends that it could not be excluded the learned counsel appearing for the first respondent submitted that the said date being the date on which the cause of action arose is bound to be excluded for the aforesaid purpose. To buttress the said contention the learned counsel relied on the provisions under Section 9 of the General Clauses Act, 1897, Sections 12(1) and (2) of the Limitation Act, 1963 and also the decision of the Hon'ble Apex Court in **Econ Antri Ltd. v. Rom Industries Ltd. (2013(3) KLT 972 (SC))**. Section 9 of the General Clauses Act reads thus:-

"9. Commencement and termination of time.-(1) In any (Central Act) or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

(2) This section applies also to all (Central Acts) made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887."

Evidently, the N.I. Act came into force on 1.3.1882 and Chapter XVII containing sections 138 to 142 was inserted in the Act with effect from 1.4.1989 by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988). Sections 12(1) and (2) of the Limitation Act, 1963 read as hereunder:-

"12. Exclusion of time in legal proceedings.-

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded."

The question as to how the period of limitation of one month has to be reckoned for the purpose of Section 142(b), N.I. Act was considered by the Hon'ble Apex Court in the decision in **Econ Antri Ltd.'s** case (supra) obviously, with reference to Sections 12(1) and (2) of the Limitation Act, 1963 and Section 9 of the General Clauses Act, 1897. The Hon'ble Apex Court held that for the purpose of calculating the period of one month prescribed under Section 142(b) of N.I. Act the date on which the cause of action arose viz., the starting day on which the cause of action arises,

should be excluded. The question in this case is whether for the purpose of calculating the period of one month prescribed under proviso (b) to Section 138 of N.I. Act the date on which the cause of action for the same arose should be excluded or not ? The cause of action under the said proviso to section 138 of N.I. Act is for making a demand for payment of the amount covered by the cheque by giving a notice in writing by the drawer and it starts from the date on which the information from the bank regarding the return of the cheque as unpaid is received by the payee or the holder in due course. There is no reason for not applying the analogy in the aforesaid decision in **Econ Antri Ltd.'s** case (supra) for the purpose of calculating the period of one month prescribed under proviso (b) to Section 138 of the N.I. Act. On such application, certainly, the date on which the receipt of information from the bank regarding the return of the cheque as unpaid received should be excluded while calculating the period for the aforesaid purpose as it being the starting on which the cause of action for making a demand in writing arose. In the said circumstances, in this case, the date 26.5.2009 is to be excluded for the aforesaid purpose and if that is excluded in the light of the decisions in **K. Madhu's** case (supra) and **Syed Hamid Bafaky's** case (supra) it could only be said that the first respondent did make a demand for the amount covered by Ext.P1 cheque in writing by giving Ext.P3 notice within 30 days as contemplated

under proviso (b) to Section 138 of N.I. Act. In such circumstances, the contention raised by the revision petitioner on the ground of improper service of notice cannot be sustained. It is also to be noted that the said contention was not actually raised by the revision petitioner either before the trial court or before the appellate court.

5. Now, I will consider the rest of the contentions of the revision petitioner. Evidently, he has taken up a contention that the execution of Ext.P1 cheque was not proved and that fact was not considered by the courts below. The courts below after appreciating the evidence on record, found that the revision petitioner has not virtually disputed the signature and handwriting in Ext.P1. The revision petitioner could not bring to my notice any piece of evidence which would go against the said finding arrived at by the courts below. The evidence of the first respondent/complainant as PW1 would reveal that he has deposed regarding the execution of the cheque in tune with the case put forth by him in the complaint. He has deposed to the effect that the revision petitioner had written and put the signature on Ext.P1 before him. This evidence tendered by him is sufficient for the purpose of Section 67 of the Indian Evidence Act, 1972. In such circumstances, and in the absence of dispute regarding the signature the first respondent/complainant was entitled to get the benefit of presumption

under Section 139 of N.I. Act, as held by the courts below. The learned counsel appearing for the revision petitioner contended that to dislodge the presumption available the revision petitioner got examined himself as DW2 and produced Exts.D1 to D3 besides getting examined DW1 and DW3. The revision petitioner, as DW2, deposed that the cheque in question was stolen by the complainant through somebody. But, at the same time, there is no case for the revision petitioner that at any point of time he lodged any complaint regarding the stealing of the cheque. The revision petitioner deposed that he had issued Ext.D1 stop memo. Ext.D1 is undated and Ext.D2 is the reply to Ext.D1 and it is dated 6.5.2009. Ext.P1 cheque is dated 31.3.2009. A plain reading of Exts.D1 and D2 would reveal that Ext.D1 was issued after the issuance of the cheque, in between 31.3.2009 and 6.5.2009 and they would also reveal that the date on which he has lost the chequess was not revealed in Ext.D1. To consider the question whether the oral testimony of the revision petitioner is trustworthy certain aspects have to be looked into. The case of the revision petitioner in defence was that the cheque in question was stolen by the complainant through somebody. At the same time, the revision petitioner did not have a case that he had lodged a complaint regarding the stealing of the cheque before the police. At the same time, he has adduced evidence through DW3 the doctor who examined him and issued Ext.D4 to show that he is a person afflicted by

the disease 'Bipolar Affective Disorder' characterised by the tendency to change the mood of mind. DW3 would depose that the revision petitioner was under treatment for a long time. Taking into account the entire evidence the trial court found that the attempt on the part of the revision petitioner by examining DW3 is to prove that he had issued Ext.P1 cheque while he was in an unconscious state of mind. However, the evidence of DW2 and DW3 with Ext.D4 was found insufficient to establish that he had issued Ext.P1 cheque while he was in an unconscious state of mind. It is pertinent to note at this juncture that the defence thus tendered through DW3 would go against the consistent case of the revision petitioner that he had not issued the cheque in question. Though it is permissible to take alternative defence in the absence of strict proof that Ext.P1 cheque was issued when the revision petitioner was in such a state of mind the evidence of DW3 was insufficient to draw any inference in favour of the revision petitioner and to dislodge the benefit of presumption available to the complainant by virtue of the provision under Section 139, N.I. Act. DW1 is the Manager of the Bank where the revision petitioner maintained the account in question. DW1 proved Exts.D1 and D2. As noticed hereinbefore, Ext.D1 is an undated stop memo issued by the revision petitioner whereby the revision petitioner requested to stop payment from his account and also requested the Manager to issue a new cheque book. It was in reply

to Ext.D1 that Ext.D2 was issued by DW1. The date on which the cheque was lost was conspicuously absent in Ext.D1. The courts below found lack of bonafides in the case of the revision petitioner regarding the stealing of cheques including Ext.P1 cheque in view of non-filing of any complaint before the police and in view of the inconsistency in his defence. The courts below have also taken into account the fact that it is improbable and hence difficult to believe that a man would keep cheque leaf idle after putting his signature and, above all, after entering amount thereon, without any purpose. In this context, it is to be noted that both the courts found from the evidence that the revision petitioner had not disputed his signature and also the writing in Ext.P1 cheque. Such conclusions and findings of the courts below cannot be said to be faulty or suffering from any legal infirmity, in the circumstances. When the account maintained by the accused was closed after issuing the cheque then the offence under Section 138, N.I. Act would be attracted. (See the decisions in **Japahari v. Priya (1993 (2) KLT 141)**, **Krishnan Nair v. Jaseentha (1998 (2) KLT 388)** and **Joseph v. Philip Joseph (2000(2) KLJ 679)**). I am of the view that in such circumstances, it is for the accused to establish legally sustainable ground to take it out of its purview. In this case, the revision petitioner has failed to establish any such ground to absolve himself from the liability. In the light of the decisions of the Hon'ble Supreme Court in **Hiten P. Dalal v.**

Bratindranath Banerjee ((2001) 6 SCC 16) and **Beena v. Muniyappan (2001 (3) KLT 950 (SC))** though the presumption available under Section 139, N.I. Act is rebuttable the burden to prove that the cheque had not been issued for discharging a debt or liability is on the accused. In view of the discussion as above, I do not find any reason whatsoever to hold that the finding of guilt was arrived at by the courts below owing to an utter perverse appreciation of evidence or against the provisions of law. The revision petitioner attempted to describe himself as a person who incurred a legal disability in the light of the evidence of DW3 with Ext.D4. I am afraid, the said contention cannot be accepted. Evidently, it is the revision petitioner himself defended the case during the trial stage and in fact, he himself filed the appeal and even this revision petition. In the said circumstances, the said contention deserves no serious consideration. After careful evaluation of the evidence on record evidently, the courts below arrived at the conclusion that the complainant/first respondent has succeeded in proving that he is entitled to get the benefit of presumption available under Section 139 of the Negotiable Instruments Act as also the presumption available under Section 118 thereunder and the revision petitioner has failed to dislodge the same. In short, after considering the rival submissions and perusing the judgments of the courts below I do not find any reason to hold that the revision petitioner has succeeded to

bring out a case warranting an interference with the convictions entered against him by the courts below, in exercise of the revisional jurisdiction. In such circumstances, the conviction entered under Section 138 of the N.I. Act is confirmed.

6. The question to be considered is whether the sentence imposed by the trial court which was modified by the appellate court, for the conviction under Section 138 of the N.I. Act, calls for any interference in invocation of the revisional jurisdiction. As noticed hereinbefore, the substantive sentence to undergo simple imprisonment for three months was modified by the appellate court as imprisonment till rising of the court. Ext.P1 cheque is dated 31.3.2009. The amount of fine is only the amount covered by the cheque in question. In such circumstances, I do not find any further scope for interfering with the sentence imposed by the appellate court for the conviction of the revision petitioner under Section 138 of the N.I. Act. In other words, the modified sentence imposed by the appellate court for the conviction under Section 138 of the N.I. Act also calls for no interference. When this Court was about to dismiss the revision petition holding such a view the learned counsel for the revision petitioner submitted that some reasonable time may be granted to the revision petitioner for depositing the amount of fine before the trial court. In the said circumstances, the learned Magistrate is

directed to keep in abeyance the execution of the sentence for a period of five months to enable the revision petitioner to deposit the amount of fine and to appear before the trial court to undergo the sentence of imprisonment till the rising of the court within the above stipulated time. Needless to say that in case of failure on the part of the revision petitioner to pay the amount of fine and to appear before the trial court to suffer the sentence within the above stipulated time appropriate steps shall be taken by the trial court forthwith to execute the sentence.

Subject to the above observation this revision petition is dismissed.

Sd/-
C.T.RAVIKUMAR
Judge

TKS