

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 06TH DAY OF JANUARY 2021 / 16TH POUSHA, 1942

Crl.Rev.Pet.No.2182 OF 2006(C)

CRA 845/2005 OF SESSIONS COURT, ERNAKULAM

CC 592/1999 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-I,
ERNAKULAM

REVISION PETITIONER/S:

- 1 M/S.THREE STAR EXPORTERS
1/1390, OPP.MOSQUE, PATTALAM, FORT COCHIN,,
REPRESENTED BY ITS PARTNER, E.R.UNNIKRISHNAN.
- 2 E.R. UNNIKRISHNAN, AGED 48 YEARS
PARTNER, M/S. THREE STAR EXPORTERS, 1/1390,, OPP.
MOSQUE, PATTALAM, FORT COCHIN.

BY ADVS.
SRI.PEEYUS A.KOTTAM
SRI.ASHIK K.MOHAMMED ALI

RESPONDENT/S:

- 1 SHIPPING CORPORATION OF INDIA, REPRESENTED BY ITS
LOCAL AGENTS, M/S. JAIRAM AND SONS, 45/364, GV
AIYER ROAD, WILLINGDON ISLAND, COCHIN-3.
- 2 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM.

R1 BY ADV. SMT.B.ANU
R1 BY ADV. SRI.ADARSH MATHEW
R1 BY ADV. SRI.DILJITH K.MANO HAR
R1 BY ADV. SRI.V.J.MATHEW SR.
R1 BY ADV. SRI.VIPIN P.VARGHESE
R2 BY PUBLIC PROSECUTOR

OTHER PRESENT:

SR.PP.M.S.BREEZ

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 22-12-2020, THE COURT ON 06-01-2021 PASSED THE FOLLOWING:

O R D E R

This revision petition is directed against the judgment dated 14.02.2006 passed in CrI.Appeal No.845 of 2005 on the file of the Sessions Court, Ernakulam, which was preferred by the revision petitioners against the judgment of conviction and sentence dated 05.10.2005 in CC No.592 of 1999 on the file of the Judicial First Class Magistrate Court-I, Ernakulam.

2. The revision petitioners were the accused in CC No.592 of 1999 on the file of the Judicial First Class Magistrate Court-I, Ernakulam consequent to a private complaint instituted by the 1st respondent (complainant) against the revision petitioners/accused 1 and 2 alleging commission of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the NI Act'). Parties are hereinafter referred to as

'the complainant' and 'the accused' according to their status in the trial court unless it is otherwise stated.

3. The case of the complainant, in brief, is as hereunder:-

The complainant, M/s Shipping Corporation of India, is represented by its local agent, M/s Jairam & Sons. The 1st accused, who is an exporting firm, and the 2nd accused, who is its partner, had approached the complainant through its local agent and requested them to ship their cargo from Kochi to Hamburg. All the details of shipments were discussed in detail including the payment of freight charges etc. Accordingly, the accused shipped 400 bags of black pepper through the complainant as per vessel "ACACIA-VOY.399" from Kochi to Hamburg. Towards the freight amount, the accused issued cheque No.509028 dated 26.05.1999 for Rs.79,160/- drawn on the

Karur Vysya Bank, Ernakulam Branch, Cochin-16. When the complainant presented the above cheque for collection through their banker, State Bank of India, Willington Island, Cochin, the same was dishonoured with an endorsement 'Exceed Arrangement' as per memo dated 18.05.1999 issued by the Karoor Vysya Bank, Ernakulam. Thereafter, the complainant sent a registered notice on 11.06.1999, demanding the amount covered under the cheque. The accused acknowledged the above notice on 14.06.1999. Even after receipt of the demand notice, the accused failed to pay the amount covered under the cheque. Hence, the complaint.

4. On service of summons, the accused appeared before the trial court. Particulars of the offence were read over and explained to the accused, to which the accused pleaded not guilty. Thereafter, the officer of the

complainant was examined as PW1 and marked Exts.P1 to P10. After PW1 was examined, the accused was questioned under Section 313(1)(b) of the Cr.P.C. for the purpose of enabling him to explain any circumstance appearing in the evidence against him. DW1 was examined on the side of the accused.

5. On appreciation of the evidence, the learned magistrate held that the execution of the cheque was admitted by the accused and that the cheque was proved by the complainant that the cheque was dishonoured for the reason 'Exceed Arrangement'. Hence, the learned magistrate concluded that the cheque was issued by the accused for the discharge of a debt or liability.

6. Heard Sri.Ashik A. Mohamed Ali, the learned senior counsel for the revision petitioners; Sri.Vipin P. Varghese, the learned counsel for the 1st respondent; and Sri.M.S.Breez, the

learned Senior Public Prosecutor for the 2nd respondent-State.

7. Sri.Ashik A. Mohamed Ali, the learned counsel appearing for and on behalf of the revision petitioners, contended that the evidence in the above case, even if given face value and taken to be correct, do not constitute an offence alleged against the accused in terms of Section 138 read with Section 141 of the NI Act. It was further submitted that, in any event, the bill of lading as well as the averments in the complaint clearly spells out that the complainant is a public sector company owned by the Government of India and the company cannot issue a letter authorizing somebody to represent in a legal proceeding. It was further contended that the person, who received power from M/s Shipping Corporation of India, is a complete stranger and no contract of agency subsists between the

complainant and the so called representative.

It was further contended that legal notice was not issued within time.

8. The learned counsel appearing on behalf of the 1st respondent, on the other hand, would submit that the accused issued the cheque in favour of the complainant pursuant to a transaction between them and the cheque, on presentation, was dishonoured for the reason 'Exceed Arrangement'. It is contended that the privity of contract is between the complainant and the accused and the technical contention under Section 230 of the Contract Act is taken to avoid payment due to the complainant.

9. In order to determine the question whether an offence punishable under Section 138 of the NI Act is made out against the accused, it is necessary to examine the penal provision of Section 138 of the NI Act and the presumptions to be raised as envisaged by the provisions of

Sections 118 and 139 of the NI Act. Section 118 of the NI Act provides certain presumptions to be raised laying down some special rules of evidence relating to presumptions. The presumption, therefore, is a matter of principle to infuse credibility to negotiable instruments including cheques and to encourage and promote the use of negotiable instruments in financial transactions. Section 118 of the NI Act provides presumptions to be raised until the contrary is proved, (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of indorsements, (vi) as to appropriate stamp and (vii) as to holder being a holder in due course. That apart, Section 139 of the NI Act provides that 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 of the NI Act for the discharge, in whole or in part, of any debt or other liability. Applying the definition of the word 'proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the NI Act, it becomes evident that in a trial under Section 138 of the NI Act, a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. Needless to say that, as and when the complainant discharges the burden to prove that the cheque was executed by the accused, the rules of presumptions under Sections 118 and 139 of the NI Act are very much available to the complainant and the burden shifts on the accused. However, this presumption is

rebuttable. Under the circumstances, it is the duty of the accused before the court by adducing evidence to show that the cheque was not supported by consideration and that there was no debt or liability to be discharged as alleged. It is necessary on the part of the accused to set up a probable defence for getting the burden of proof shifted to the complainant. Once such rebuttable evidence is adduced and accepted by the court, the burden shifts back to the complainant.

10. PW1 is the Manager of M/s Jairam & Sons. The firm has issued Ext.P1 power of attorney in favour of PW1. When examined before the court, he stated that he is the Manager of the firm. The complainant is M/s Shipping Corporation of India. It is represented by M/s Jairam & Sons, one of the local steamer agents of the Shipping Corporation of India. The complaint is signed by the power of attorney holder of

the firm, M/s Jairam & Sons. The person, who signed in the complaint, is the Manager of the firm, M/s Jairam & Sons.

11. During the trial, the accused entered appearance before the court and denied the accusation levelled against him. Another case of the same nature between the same parties was pending before the very same court as CC No. 593 of 1999. Hence, joint trial was ordered and the evidence was taken in CC No. 592 of 1999. Against the judgment dated 05.10.2005, the accused preferred this CrI.R.P. It is seen from the records that the accused in CC No. 593 of 1999 preferred CrI. Appeal No. 846 of 2005 before the Sessions Court and the same was dismissed. However, no revision is seen filed challenging the judgment in CrI. Appeal No. 846 of 2005. Hence, it appears from the facts and circumstances that the judgment in CrI. Appeal

No. 846 of 2005 has become final between the parties on identical matters.

12.The learned counsel for the revision petitioners/accused contended that the complainant is only an agent for the principal and an agent cannot personally enforce a contract under Section 230 of the Contract Act. It is contended that the transaction covered is not enforceable through court by the complainant.

13.The complainant, M/s Shipping Corporation of India, is doing business through its agent. In connection with the shipment, they are issuing bill of lading. It is the duty of its agent to collect the freight charges and deposit the same to the account of the Corporation. They are collecting freight charges as part of their business as steamer agents. Collecting freight charges for and on behalf of the M/s Shipping Corporation of India is not a case of

delegation. Ext.P3 would show that shipment of the cargo of the accused was conducted through the vessel of M/s Shipping Corporation of India. According to the accused, the cheque was not issued to M/s Jairam & Sons, but it was issued to M/s Leap Forwarders Pvt. Ltd. Ext.P3 series, on the other hand, would show that shipment was made through M/s Jairam & Sons. The cheque was issued for shipment of the cargo of the accused also. Even if the shipment was through M/s Leap Forwarders Pvt. Ltd., it would be payment to the shipping company or the agents, through whom the shipment was made. In this case, no evidence was adduced to show that it was given through M/s Leap Forwarders Pvt. Ltd. The evidence adduced would show that the freight charge of the shipment was made after issuing Ext.P3 series of bills of lading for a legally enforceable debt. In this case, the cheque was

drawn in the name of M/s Shipping Corporation of India and notice was issued in the name of M/s Jairam & Sons, their local agent.

14. Apart from the 1st accused partnership firm, the partner of the 1st accused was also made as an accused in the case. Admittedly, they issued the cheque, which, on presentation, was dishonoured for the reason 'Exceed Arrangement'. A person would be vicariously liable for commission of offence on the part of the partnership firm only in the event the conditions and stipulations prescribed under Section 138 read with Section 141 of the NI Act are satisfied with. The above principle has been dealt with in detail by the Supreme Court in **M/s Kusum Ingots & Alloys Ltd. v. M/s Pennar Peterson Securities Ltd. and others** [(2000)2 SCC 745] as follows:-

"10. On a reading of the provisions of Section 138 of the NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that 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;

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the 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 the bank;

(iv) the payee or the holder in due course of the cheque 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 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

15. For creating criminal liabilities in terms of Section 138 of the NI Act, the complainant is obliged to show that a cheque was issued; the same was presented; but, it was dishonoured; a notice in terms of the said provision was served on the person sought to be made liable;

and despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the statutory notice.

16. Section 141 of the NI Act provides constructive liability on the part of the Directors of the company or other persons responsible for the conduct of the business of the company. Though the heading of Section 141 of the NI Act reads "Offences by companies", as per the Explanation to that Section "company" means "any body corporate and includes a firm or other association of individuals"; and "director" in relation to a firm, means a "partner" in the firm. Their liability is joint and several. Consequently, therefore, when an offence is alleged to have been committed by the partnership firm, every person who, at the time the offence was

committed, was in charge of and was responsible to the firm for the conduct of its business as well as the firm shall be deemed to be guilty of the offence and shall be liable to be proceeded under Section 138 of the NI Act. In **S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla & another** [(2005) 8 SCC 89], it was held that a signatory to the cheque can be held to be a person liable under Section 141 of the NI Act. It has come out in evidence that the 2nd accused issued the cheque in favour of the complainant for a legally enforceable debt. The cheque in question was drawn for consideration and the holder of the cheque received the same in discharge of an existing debt. Ex.P3 bill of lading is not sufficient to indicate that the amount was due to M/s Shipping Corporation of India and the complainant was actually the steamer agent of M/s Shipping Corporation of India. It has come

out in evidence that the accused issued cheque to the complainant and the complainant received the same. Although the complainant issued legal notice to the accused, no reply was issued denying the liability. Ext.P5 cheque dated 26.05.1999 is for an amount of Rs.79,160/-. The said cheque was presented before the State Bank of India, Willington Island, Kochi on 04.06.1999. Ext.P6 cheque is dated 18.05.1999 and is for an amount of Rs.79,325/-. Ext.P8 notice was issued on 11.06.1999. Hence, statutory notice was issued right in time. When the cheque was issued in the name of the complainant, it is illogical to contend that the amounts due on account of the shipping were made through M/s Shipping Corporation of India, for whom M/s Jairam & Sons stood as an agent. The accused had not offered any explanation as to why they had issued Ext.P5 cheque to M/s Shipping

Corporation of India.

17.The conclusions drawn by the trial court and the appellate court to convict the accused 1 and 2 are perfectly legal. The cheque in question was drawn for consideration and the holder of the cheque received the same in discharge of an existing debt. Thereafter, the onus shifts on the accused to establish a probable defence so as to rebut such presumption, which onus has not been discharged by the accused. Once the cheque is proved to be issued, it carries statutory presumption of consideration under Sections 118 and 139 of the NI Act. Then, the onus is on the accused to disprove the presumption at which they have not succeeded.

18.It is well settled law that when concurrent findings of facts rendered by the trial court and appellate court are sought to be aside in revision, the High Court does not, in the

absence of perversity, upset factual findings arrived at by the two courts below. It is not for the revisional court to re-analyse and reinterpret the evidence on record in a case, where the trial court has come to a probable conclusion. Unless the contrary is proved, it is presumed that the holder of a cheque received the cheque of the nature referred to in Section 138 of the NI Act for the discharge, in whole or in part, of any debt or other liability. In the case at hand, the accused has no case that he has not signed the cheque or parted with under any threat or coercion. That apart, the accused has no case that unfilled cheque had been lost irrecoverably or stolen. The accused failed to prove in the trial by leading cogent evidence that there was no debt or liability. In **Bir Singh v. Mukesh Kumar [(2019) 4 SCC 197]**, the Supreme Court held that in view of Section 139

of the NI Act read with Section 118 of the NI Act thereof, the Court has to presume that the cheque has been issued for discharging a debt or liability. Paragraphs 39 and 40 of the above case are relevant in this context and the same are extracted below for convenience of reference:-

"39. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."

19. In view of the above, both the trial court and the appellate court rightly held that the burden was on the accused to disprove the initial presumption under Sections 118 and 139

of the NI Act. The accused was examined as DW1 in this case. He stated that the cheque was entrusted to M/s Leap Forwarders as a blank signed one. No evidence was let in to prove the alleged entrustment with M/s Leap Forwarders as contended. The burden is not discharged rightly. Hence, the conviction of the accused for the offence under Section 138 of the NI Act is only to be upheld.

20. Coming to the question of sentence, the trial court convicted and sentenced the 1st accused to pay a fine of Rs.5,000/- each and 2nd accused to undergo simple imprisonment for three months each in CC Nos. 592 and 593 of 1999 on the file of the Judicial First Class Magistrae Court-I, Ernakulam. Further, it was ordered to pay a sum of Rs.1,19,000/- in CC No.592 of 1999 and Rs.1,18,000/- in CC No. 593 of 1999 to the complainant under Section 357(3) of Cr.P.C. and default of payment of

fine to undergo simple imprisonment for three months each more. The amount involved in CC No. 592 of 1999 is Rs.79,160/- as per cheque bearing No. 509028 dated 26.05.1999. This revision is confined to an amount of Rs.79,160/- only. So far as CC No. 593 of 1999 is concerned, the accused preferred Crl. Appeal No. 846 of 2005 before the Sessions Court, Ernakulam. Crl. Appeal 845 of 2005 arising out of CC No. 592 of 1999 and Crl. Appeal 846 of 2005 arising out of CC No. 593 of 1999 were heard together by the learned Sessions Judge and pronounced a common judgment on 14.02.2006. The accused challenged the judgment in Crl. Appeal 845 of 2005 before this Court. Regarding the other case, no submission was advanced by the learned counsel

for the revision petitioner. The only logical inference is that on identical facts, CrI. Appeal No. 846 of 2005 has become final between the parties.

21. In view of the discussion made herein above, the concurrent conviction under Section 138 of the NI Act is sustained. Section 138 of the NI Act provides sentence of imprisonment or with fine or with both. Sentence of imprisonment is not compulsory. The object is to pay the amount covered under the cheque. Hence, the mandatory term of imprisonment awarded by the trial court, which was confirmed in appeal, is liable to be set aside. The conviction and sentence as against the 1st accused stand confirmed. While confirming the conviction of the 2nd accused, in modification of the sentence, the 2nd accused is sentenced to pay a fine of Rs.79,160/- and in default of payment of fine to undergo simple imprisonment for a

period of three months. If the amount is paid as compensation, the same shall be given to the complainant as compensation under Section 357(3) of Cr.P.C.

With the above modification, the CrI.R.P. is allowed in part. In view of the situation prevailing in the country due to the outbreak of Covid-19 pandemic, this Court is inclined to grant six months time from today to the revision petitioners/accused 1 and 2 to deposit the compensation and the fine amount before the trial court, failing which the learned Magistrate shall take necessary steps to execute the sentence against the revision petitioners/accused 1 and 2 in accordance with law.

The Registry is directed to forward the entire records to the trial court forthwith.

Sd/-

N.ANIL KUMAR

JUDGE