IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

TUESDAY, THE 7TH DAY OF NOVEMBER 2023 / 16TH KARTHIKA, 1945

CRL.REV.PET NO. 1374 OF 2010

CRA 213/2009 OF ADDITIONAL SESSIONS COURT (ADHOC-I), ERNAKULAM

CC 717/2006 OF JUDL. MAGISTRATE OF FIRST CLASS, KOTHAMANGALAM

REVISION PETITIONER/APPELLANT/ACCUSED:

P.K. UTHUPPU, AGED 56 YEARS,

BY ADV SRI.S.RAJEEV

RESPONDENTS/RESPONDENTS/COMPLAINANT:

1 N.J. VARGHESE, S/O.JOSEPH,

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

BY ADV SRI.R.BINDU SASTHAMANGALAM

OTHER PRESENT:

SHRI RENJIT GEORGE-SR.PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 31.10.2023, THE COURT ON 07.11.2023 PASSED THE FOLLOWING:

"CR"

O R D E R

This revision is at the instance of the accused in CC No.717 of 2006 on the file of Judicial Magistrate of First Class, Kothamangalam, assailing the judgment in Crl.Appeal No.213 of 2009 on the file of Additional Sessions Judge (Adhoc-I), Ernakulam, which upheld his conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred as 'the N.I Act'), though the substantive sentence was reduced to one day till rising of court without altering the fine amount.

2. CC No.717 of 2006 was based on a private complaint filed by the 1st respondent herein, against the revision petitioner, alleging an offence punishable under Section 138 of the N.I Act. His case was that, the revision petitioner borrowed Rs.4 lakh from him on 27.09.2006, and towards discharge of that debt, he issued Ext.P1 cheque on 13.10.2006, assuring him that there would have been sufficient funds in his bank account to honour the same. Accordingly, the 1st respondent presented that cheque before the drawee bank, but it was dishonoured due to insufficiency of funds, and it was returned to the 1st respondent along with a memo dated 17.10.2006. He sent lawyer notice to the revision petitioner in the

address of his business place and also at his residential address, intimating dishonour of the cheque and demanding the cheque amount. In spite of receipt of that notice, he failed to repay the amount and hence he filed the complaint under Section 138 of the N.I Act.

3. On appearance of the revision petitioner on summons, the learned trial court read over and explained the particulars of offence, to which he pleaded not guilty and claimed to be tried.

4. PWs 1 and 2 were examined and Exts.P1 to P6 were marked from the side of the 1st respondent. The revision petitioner denied all the incriminating circumstances brought out in evidence, in his 313 examination. But, no defence evidence was adduced.

5. The trial court, on analysing the facts and evidence, found the revision petitioner guilty under Section 138 of the N.I Act, and he was sentenced to undergo simple imprisonment for six months and to pay compensation of Rs.4 lakh with interest @ 9% per annum from the date of dishonour of the cheque till the date of payment. In default, he had to undergo simple imprisonment for six months more.

6. Aggrieved by the judgment of conviction and sentence, the revision petitioner preferred Crl.Appeal No.213 of 2009. Before

the appellate court, the revision petitioner filed Crl.M.P No.3765 of 2009 to accept the reply notice along with its postal receipt and acknowledgment card, and the same was accepted and marked as Exts.D1, D1(a) and D1(b). His further prayer in that petition, to recall PW1 for further cross examination, was rejected. His Crl.M.P No.3764 of 2009 for summoning the Manager of the Union Bank of India, to produce cheque No.203355 dated 27.09.2006, by which the 1st respondent allegedly made payment of Rs.4 lakh to the revision petitioner, was rejected by the appellate court, for the reason that, the said Manager was already examined from the side of the 1st respondent as PW2 and, Ext.P6 document was marked through him.

7. On analysing the available facts and evidence, the appellate court confirmed the conviction, but the substantive sentence of simple imprisonment for six months was reduced to imprisonment till rising of court, and the compensation amount of Rs.4 lakh awarded by the trial court was converted into fine amount, and in default of payment of fine, the revision petitioner was directed to undergo simple imprisonment for two months, with a further direction that the fine amount will be paid to the complainant as compensation under Section 357(1) of Cr.P.C.

Aggrieved by the appellate court judgment, the revision petitioner approached this Court with the above revision petition.

8. Heard learned counsel for the revision petitioner and learned counsel for the 1st respondent.

9. The High Court while exercising the revisional jurisdiction under section 401 read with Section 397 of Cr.P.C. is exercising its supervisory jurisdiction for correcting miscarriage of justice, after verifying the correctness, legality or propriety of the finding sentence or order of the courts below, and neither it can be equated with the power of an appellate court, nor it can be treated as a second appellate jurisdiction. So the limited power under the revisional jurisdiction is to do justice in accordance with the principles of criminal jurisprudence, and therefore it would not be appropriate for the High Court to re-appreciate the evidence and to enter into a contra finding based on its own conclusions, unless there is any glaring feature brought to the notice of the court which would tantamount to gross miscarriage of justice. In this backdrop, let this court analyse the scope of this revision.

10. The revision petitioner is challenging the judgment of the appellate court mainly on the ground that, Ext.P1 cheque was issued not for discharge of any legally enforceable debt. According

to him, he had availed a loan for his vehicle from the financial institution run by the 1st respondent, and some blank documents including a blank cheque signed by him, were given as security, and on closing that loan, those documents were returned, except the blank cheque, saying that, it was misplaced somewhere. Subsequently, misusing that cheque, a false case was foisted by the 1st respondent.

11. The revision petitioner is alleging transaction with the financial institution of the 1st respondent in connection with a vehicle loan. But no scrap of paper has been produced by him to show that, the 1st respondent was running a financial institution, or to show that at any point of time, he had availed a vehicle loan from such an institution. Even according to the revision petitioner, when he closed that loan transaction, all the documents received by the 1st respondent at the time of availing the loan, were returned to him. If so, he could have very well produced those documents to show that the 1st respondent was running a financial institution, and the revision petitioner had availed a vehicle loan from that institution. So, that part of his argument is liable to be rejected.

12. Another contention taken up by the revision petitioner is

that, in the complaint, the 1st respondent has stated that, Rs.4 lakh was given to the revision petitioner in cash. But, during cross examination as PW1, he would say that the amount was given by way of a cash cheque. Ext.P6 is the Bank statement of the 1st respondent in Union Bank of India, Kothamangalam branch. The entry dated 27.09.2006 in that Bank statement shows the name of Sri.Uthuppu P. K. and towards his name, cheque No.203355 also is shown. Sri.Uthuppu P. K. is none other than the revision petitioner herein. The date of that transaction is 27.09.2006, which substantiates the case of the 1st respondent, that he had given Rs.4 lakh to the revision petitioner on 27.09.2006 by way of a cash cheque. PW2, the Bank Manager, also deposed before court that, on 27.09.2006, the cheque was presented before his Bank by Sri.Uthuppu and Rs.4 lakh was withdrawn. So, the contention of the learned counsel for the revision petitioner that, he was denied of an opportunity to summon the Bank Manager to produce the original of cheque No.203355, to show that, the said cheque was not encashed by him, is of no avail. Since Ext.P6 document shows payment of Rs.4 lakh on 27.09.2006 to Sri.Uthuppu P.K. by way of cheque No.203355 drawn from the account of the 1st respondent, it is

sufficient to infer that, the said amount was received by the revision petitioner on 27.09.2006 from the account of the 1st respondent.

13. Regarding Ext.P1 cheque, learned counsel for the revision petitioner would say that, though it was signed by the revision petitioner, it was given as a blank one, as a security for the vehicle loan availed by him, and it was filled up by the 1st respondent subsequently. According to him, Ext.P1 cheque was filled up in a different ink in a different handwriting and that itself will substantiate his case.

14. In **Bir Singh v. Mukesh Kumar [2019 (1) KHC 774: (2019) 4 SCC 197 : 2019 (1) KLT 598]**, the Apex Court held that, when a signed blank cheque is voluntarily given to a payee, towards some payment, the payee may fill up the amount and other particulars, and that will not invalidate the cheque. The onus to rebut the presumption under Section 139 of the N.I Act that the cheque has been issued in discharge of a debt or liability, is on the revision petitioner. Even if a blank cheque leaf is voluntarily signed and handed over by the accused, towards some payment, it would attract the presumption under Section 139 of the N.I Act, in the absence of any cogent evidence to show that the cheque was not

issued in discharge of a debt.

15. Paragraphs 37 to 40 of the judgment cited supra read thus:

> "37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, S.20, S.87 and S.139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of S.138 would be attracted.
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> 38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.
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> 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 S.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 S.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".

16. In the case on hand, the revision petitioner failed to show that, Ext.P1 cheque was issued as a security for the vehicle loan availed by him from the financial institution of the 1st respondent. According to the 1st respondent, who was examined as PW1, the revision petitioner was familiar to him while he was working in Union Bank, Muvattupuzha, and the revision petitioner was running a sawmill at Muvattupuzha. When he requested for a loan amount of Rs.4 lakh, a bearer cheque was issued to him for that amount. Ext.P6, his Bank statement, substantiates that fact, especially when the entry dated 27.09.2006 shows the name of the revision petitioner. So, the contradiction, if any, as to the mode of payment by way of cash or cash cheque, is of no relevance. Even if Ext.P1 cheque was given as a blank one, affixing his signature only, then also, the revision petitioner cannot disown the same, as he has no case that, he had given that cheque under any threat or coercion. As the payment is proved through Ext.P6, the only presumption is that, Ext.P1 cheque was issued towards discharge

of that debt.

17. The revision petitioner failed to adduce any cogent evidence to show that, the cheque given by him was not towards discharge of any legally enforceable debt. The contentions with regard to the vehicle loan, entrustment of blank cheque etc. are liable to be rejected, as no evidence is forthcoming to support the same. As he is admitting that, Ext.P1 cheque was signed by him and it was voluntarily given by him to the 1st respondent, not under any threat or coercion, the presumption under Section 139 of the N.I Act is very much available to the 1st respondent, and the revision petitioner failed to rebut that presumption.

18. Another argument put forward by the learned counsel for the revision petitioner is that, in 313 examination, the learned Magistrate did not put all the circumstances appearing in evidence against the revision petitioner and so, he did not get an opportunity to give proper explanation, which according to him, amounts to serious irregularity which would vitiate the trial.

19. In **Asraf Ali v. State of Assam [2008 KHC 5081 : 2008 CriLJ 4338: (2008) 16 SCC 328],** the Apex Court held that, '*Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of*

enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately, and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the Trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice'.

20. Learned counsel for the revision petitioner pointed out that in the complaint, the complainant has stated that, he advanced Rs.4 lakh to the revision petitioner in cash. But, during cross examination, he deposed that, the amount was given by way of a cash cheque. Since that fact was not put to the revision petitioner during 313 examination, it will vitiate the trial according

to him.

21. The 1st respondent filed the complaint for prosecuting the revision petitioner under Section 138 of the N.I Act, based on Ext.P1 cheque. According to him, that cheque was issued towards repayment of Rs.4 lakh advanced by him to the revision petitioner on 27.09.2006. The mode of advancing the money is irrelevant, as far as a complaint under Section 138 of the N.I Act is concerned, and what is relevant is whether the cheque in question was issued towards discharge of any legally enforceable debt. PW1 produced Ext.P6 Bank statement and examined PW2-the Bank Manager to show the payment of Rs.4 lakh to the revision petitioner on 27.09.2006. Not even a suggestion was put to PW2-Bank Manager, by the revision petitioner during cross examination that, Sri.Uthuppu named in Ext.P6 was not the revision petitioner herein. The mode of advancing the amount to the revision petitioner, was not an incriminating material to be confronted with the revision petitioner during his 313 examination, as long as he was not disputing Ext.P1 cheque bearing his signature, and dishonour of that cheque for insufficiency of funds. The discrepancy if any in the statement of PW1 regarding the mode of payment of the amount to the revision petitioner, may be a circumstance,

available to the revision petitioner, to challenge the genuineness of the transaction alleged by the 1st respondent. At any rate it cannot be treated as an incriminating circumstance brought out against the revision petitioner to be put, in his examination under Section 313 of Cr.P.C.

22. Section 313 Cr.P.C reads thus:

> "**313. Power to examine the accused**.—(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—
>
> (*a*) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;
>
> (b) xxx xxx xxx"

23. As the mode of advancing the amount to the revision petitioner was not a circumstance appearing in evidence against the revision petitioner, absence of a question in the 313 examination regarding the mode of payment will not in any way vitiate the trial.

24. The revision petitioner if wanted to rebut the presumption under Section 139 of the N.I Act, he should have adduced cogent evidence for disproving the entry dated 27.09.2006 in Ext.P6 document. It is true that, the revision petitioner can even rely on

the materials submitted by the complainant/1st respondent, in order to raise a probable defence which creates doubt about the existence of a legally enforceable debt or liability, without adducing separate evidence of his own. In the case on hand, the materials and evidence on record adduced from the side of the 1st respondent are not capable of rebutting the presumption, in favour of the revision petitioner even by preponderance of probabilities. So he was bound to adduce evidence of his own so as to rebut the presumption but it was not done. Since the presumption stands unrebutted, this Court has to hold that, the appellate court rightly upheld the conviction of the revision petitioner under Section 138 of the N.I Act, and sentenced him to undergo imprisonment till rising of the court and to pay fine of Rs.4 lakh and in default to undergo simple imprisonment for two months, with a further direction that if the fine amount is realised, it will be paid to the 1st respondent as compensation under Section 357(1) of Cr.P.C.

25. In the result, the revision petition is dismissed, upholding the impugned judgment in Crl.Appeal No.213 of 2009. The revision petitioner is directed to surrender before the trial court on or before 28.11.2023 to receive the sentence and to pay the fine

amount. In default, the trial court has to issue arrest warrant against the revision petitioner for executing the sentence.

Registry of this Court is directed to transmit the case records to the trial court forthwith, so as to execute the sentence, without further delay.

Sd/-
SOPHY THOMAS
JUDGE

smp