HIGH COURT OF KERALA

Bench: Justice C.S. Dias.

Date of Decision: 29 September 2023

CRL.REV.PET NO. 3051 OF 2010

AGAINST THE ORDER/JUDGMENT CRA 85/2010 OF 4 ADDITIONAL DISTRICT

COURT, ERNAKULAM ST 3308/2008 OF JUDICIAL MAGISTRATE OF FIRST CLASS - IV, ERNAKULAM

SHIBY POLY

Vs

1 **MARY DEVACHAN**

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

Sections, Acts, Rules, and Article:

Section 118, 138, 139 of the Negotiable Instruments Act (N.I. Act)

Sections 397 to 401 of the Code of Criminal Procedure (Cr.P.C)

Subject: Challenge to Conviction under Section 138 of the Negotiable Instruments Act.

Headnotes:

Criminal Revision Petition – Challenge to Conviction under Section 138 of the Negotiable Instruments Act – Accused Director of a Company – Complaint filed for dishonored cheques – Accused convicted by Trial Court – Appellate Court upheld the conviction – Revisional jurisdiction invoked – Legal principles regarding the reverse onus of proof under Section 139 of the N.I. Act discussed – No error found in concurrent findings of lower courts – Revision petition dismissed – Directions for payment of fine and appearance before Trial Court issued. [Para 1-25]

Referred Cases:

- Sanjaysinh Ramrao Chavan vs. Dattatray Gulabrao Phalke & Anr [(2015) 3 SCC 123].
- S.P. Mani and Mohan Dairy vs. Dr. Snehalatha Elangovan [2022 (6) KHC 215].
- Rangappa vs. Sri Mohan [2010 KHC 4325].
- Kalamani Tex and Anr vs. P. Balasubramanian [2021 (2) KHC 517].

Representing Advocates:

For the Revision Petitioner: Sri. Anil Xavier, Smt. K. Indu Pournami, Sri. M. Rishikesh Shenoy, Sri. M. Shaheed Ahmad.

For the 1st Respondent: Sri. P. Rajendran.

For the 2nd Respondent (State of Kerala): Smt. Seetha S., Public Prosecutor.

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THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 29.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER

The revision petitioner calls in question the legality and propriety of the judgment of the Court of the IVth Additional Sessions Judge, Ernakulam (Appellate Court) in Crl.Appeal No.85/2010, which in turn confirmed the judgment of the Judicial First Class Magistrate Court No.IV, Ernakulam (Trial Court) in S.T.No.3308/2008, convicting and sentencing the revision petitioner for the offence under Section 138 of the Negotiable Instruments Act (for brevity, "N.I.Act"). The revision petitioner was the 3rd accused and the 1st respondent was the complainant before the Trial Court. The parties, for the sake of convenience, are referred to as per the status before the Trial Court.

The facts in brief:

2. The complainant had filed the complaint against the accused (1st accused company and its two directors accused 2 and 3) alleging them to have committed the offence under Section 138 of the N.I.Act. The case

of the complainant was that in discharge of the liability of the 1st accused company, the accused 2 and 3 had issued two cheques (Exts.P2 and P4 dated 27.03.2008 and 30.05.2008 respectively) for an amount of Rs.50,000/- each to her. The cheques, on presentation to the bank for collection, was returned by Exts.P3 and P5 memorandum due to "insufficient funds" in the account of the 1st accused company. Although the complainant issued Ext.P6 statutory lawyer notice to the accused, they refused to pay the demanded amount. Hence, the accused have committed the offence under Section 138 the N.I.Act.

3. The 1st accused company did not appear through any representative and the 2nd accused was reported to be in a comatose state. Therefore, the case against them was split up and the Trial Court proceeded with the trial against the 3rd accused. The 3rd accused pleaded not guilty to the substance of accusation read against her.

Trial

4. In the Trial, PW1 was examined and Exts.P1 toP7 were marked in evidence. The 3rd accused denied the incriminating circumstances put to her in the questioning under Section 313 of the Cr.P.C. The 3rd accused also did not let in any defence evidence.

Trial Court Judgment

5. The Trial Court, after analysing the materials on record, found the 3rd accused guilty and convicted her for the offence under Section 138 of the N.I.Act and sentenced her to undergo imprisonment till the rising of the Court and to pay the 1st respondent an amount of Rs.1,00,000/- as compensation, and in default to undergo simple imprisonment for a further period of one month.

6. Aggrieved by the said judgment, the revision petitioner/3rd accused filed Criminal Appeal No.85/2010 before the Appellate Court.

Appellate Court judgment

7. The Appellate Court, after re-appreciating the materials on record, by the impugned judgment,confirmed the conviction and the sentence imposed by the Trial Court.

8. It is assailing the concurrent findings in the judgments passed by the courts below, the revision petition is filed.

9. Heard; Sri.Anil Xavier, the learned Counsel appearing for the revision petitioner; Sri.P.Rajendran, the learned Counsel appearing for the 1st respondent and Smt.Seetha S., the learned Public Prosecutor appearing for the 2nd respondent.

10. Is there any illegality, impropriety and irregularity in the judgments of the courts below.

11.The revisional jurisdiction of this Court under Secs.397 to 401 of the Cr.P.C. is fairly well settled in a catena of precedents, which state that the power is to be sparingly exercised and only in cases of exceptional rarity. The power is more in the nature of a supervisory jurisdiction, to correct patent errors, manifest illegality and when there is total miscarriage of justice.

12. In **Sanjaysinh Ramrao Chavan vs Dattatray Gulabrao Phalke & Anr** [(2015) 3 SCC 123], the Hon'ble Supreme Court has succinctly laid down the scope and purport of the powers under Secs.397 to 401 of the Cr.P.C. It is apposite to extract the revisional declaration of law, which reads as follows:

> "14. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non- consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an

appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional
jurisdiction."

13. Now, coming back to the facts of the case at hand.

14. The revision petitioner's cardinal contention is that there is no material on record to establish that she was in charge and responsible for the day to day affairs of the 1st accused company. It is without such material that the courts below have concluded that the revision petitioner/3rd accused is guilty for the offence under Section 138 of the N.I.Act.

15. In **S.P.Mani and Mohan Dairy vs. Dr.Snehalatha Elangovan** [2022 (6) KHC 215], the Honourable Supreme Court, after a survey of all the earlier pronouncements on Section 141 of the N.I.Act, has succinctly summarized the law thus:

"47. Our final conclusions may be summarised as under:

a.) The primary responsibility of the complainant is tomake specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to subsection (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.

b.) The complainant is supposed to know only generallyas to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141 respectively of the NI Act shows that on the other elements of an offence under Section

138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company/partners of a firm to show that they were not liable to be convicted. The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm.

c.) Needless to say, the final judgement and order woulddepend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners 'qua' the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

d.) If any Director wants the process to be quashed byfiling a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/she must make out a case that making him/her stand the trial would be an abuse of process of Court.

16. The law propounded above only casts the primary responsibility on the complainant to aver in the complaint that the accused were in charge and responsible for the conduct of the business of the firm when the offence was committed. Nevertheless, the complainant is not obliged to establish that the accused were aware of every transaction.

17. In the case at hand, the complainant has specifically averred that the accused 2 and 3 are the Managing Director and Director of the 1st accused company and were responsible for the management and conduct of the business of the 1st accused company, and they were the signatories of the cheque in question. Hence, the accused 2 and 3 are liable to be proceeded with and trial under Section 141 of the N.I.Act.

18. Irrefutably Exts.P2 and P4 cheques have been signed by the accused 2 and 3. The accused has not let in any cogent evidence to rebut the fact that they were not in charge of the day to day business and administration of the 1st accused firm.

19. A negotiable instrument, which includes a cheque, carries the presumption of consideration under Secs.118(a) and 139 of the N.I Act. It is profitable to extract the said relevant provisions:

"118. Presumptions as to negotiable instruments – Until the contrary is proved, the following presumptions shall be made;-

(a) of consideration-that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

139. Presumption in favour of holder. —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, for the discharge, in whole or in part, of any debt or other liability".

20. A three-Judge Bench of the Hon'ble Supreme Court in **Rangappa vs. Sri.Mohan** [2010 KHC 4325], while dealing with Sec.139 of the N.I Act has conceptualised the doctrine of 'reverse onus', by holding thus:

" 18. In light of these extracts, we are in agreement with the respondent - claimant that the presumption mandated by S.139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat (supra) may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While S.138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under S.139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by S.138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused / defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden.

Keeping this in view, it is a settled position that when an accused has to rebut the presumption under S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can

rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his / her own.

15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under S.138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant - accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction – related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction - expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant".

21. Recently, a three-Judge Bench of the Hon'ble Supreme Court in **Kalamani Tex and Anr vs. P. Balasubramanian** [2021 (2) Balasubramanian HC 517] has reiterated the legal position and doctrine of the reverse onus. It is apposite to extract the relevant paragraphs, which

declares the law on the point in the following terms:

"14. Adverting to the case in hand, we find on a plain reading of its judgment that the trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under Section 118 and Section 139 of NIA. The Statute mandates that once the signature (s) of an accused on the cheque/negotiable instrument are established, then these 'reverse onus' clauses become operative. In such a situation, the obligation shifts upon the accused to discharge the presumption imposed upon him. This point of law has been crystalized by this Court in Rohitbhai Jivanlal Patel v. State of Gujarat (2019 (2) KHC 243)."

22. In the instant case, although the accused were

served with Ext.P6 lawyer notice informing them regarding the dishonor

of the cheque, the accused failed to sent any reply or pay the demanded

amount. They have also not let in any evidence to rebut the reverse onus of proof laid down under Section 139 of the N.I.Act.

23. In **Rangappa** (supra), the Honourable Supreme Court has held that, once a cheque is dishonoured, a reverse onus of proof is cast on the accused under Section 139 of the N.I.Act. And, if the accused fail to reply to the statutory lawyer notice issued under Section 138 of the N.I.Act, then an inference has to be drawn in favour of the complainant.

24. The courts below, after appreciating thematerials on record, have concluded that the revision petitioner/3rd accused is guilty for the offence charged against her. I do not find any error, illegality or impropriety in the concurrent findings of the courts below to take a contrary view that the revision petitioner has not committed the offence under Section 138 of the N.I.Act. Thus, I confirm the concurrent convictions of the courts below and the sentenceimposed by the Appellate Court.

25. At the said point of time, the learned Counselappearing for the revision petitioner prayed that the revision petitioner may be granted two months' time to pay the fine amount. As the revision petition is of the year 2010 and the fact that this Court had suspended the execution of sentence on 28.10.2010, I find the present submission to be reasonable and justifiable. Hence, I am inclined to accept the said submission.

In the result;

(i) The revision petition is dismissed;

(ii) The conviction and sentence imposed by the courts below are confirmed;

(iii) The revision petitioner is directed to appear before the Trial Court on or before 29.11.2023, to undergo the substantive sentence and to pay the compensation amount;

(iv) Needless to mention, if the revision petitioner has already deposited any amount towards the fine amount, only the balance amount need be deposited;

(v) In case of failure of the revision petitioner to appear before the Trial Court, the Trial Court shall execute the sentence and recover the fine amount from the revision petitioner, in accordance with law.

(vi) The execution of the sentence shall stand deferred till 29.11.2023.

(vii) The Registry is directed to forthwith forward a copy of this order to the Trial Court for compliance.