

**Santhoshkumar Vs. Kuttan**

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**Court :** Kerala

**Decided On :** Nov-21-2014

**Judge :** Honourable Mr. Justice K.Ramakrishnan

**Appellant :** Santhoshkumar

**Respondent :** Kuttan

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN FRIDAY, THE 21<sup>ST</sup> DAY OF NOVEMBER 2014 30<sup>TH</sup> KARTHIKA, 1936 CrI.Rev.Pet.No. 1999 of 2014 ()  
----- AGAINST THE

JUDGMENT

IN CrI. APPEAL 4452011 of ADDITIONAL DISTRICT & SESSIONS COURT (ADHOC-I), PALAKKAD, DATED 2308-2013 & AGAINST THE

JUDGMENT

IN ST 7092009 of J.M.F.C., ALATHUR, DATED 0705-2011 REVISION PETITIONER(S): ----- SANTHOSHKUMAR S/O. RADHAKRISHNAN, I.T.C, ANJUMOORTHY MANGALAM, PALAKKAD. BY ADV. SRI.V.A.JOHNSON (VARIKKAPPALLIL) RESPONDENT(S): ----- 1. KUTTAN, S/O. KOYU, KONNANCHERY, AYAKKAD, VADAKKENCHERRY, PALAKKAD - 678 543.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682 031. R2 BY PUBLIC PROSECUTOR SRI. N. SURESH THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 21.11.2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: ss K. RAMAKRISHNAN, J.

..... Crl. R. P.No.1999 of 2014 . . . .  
..... Dated this the 21st day of November,  
2014

## ORDER

Accused in S.T.No.709/2009 on the file of the Judicial First Class Magistrate Court, Alathur, is the revision petitioner herein. The case was taken on file on the basis of a private complaint, filed by the complainant/ first respondent against the revision petitioner, alleging offence under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, the revision petitioner borrowed a sum of 55,000/- on 10.12.2008 and in discharge of that liability, the revision petitioner issued Ext.P1 cheque dated 09.01.2009 drawn on State Bank of Travancore, Erimayur Branch and the cheque when presented was dishonored for the reasons 'funds insufficient' vide Ext.P2 dishonor memo dated 21.01.2009 and the same was intimated to the complainant by his banker vide Ext.P3 letter dated Crl. R. P.No.1999 of 2014 2 21.01.2009. The complainant issued Ext.P4 notice on 31.01.2009 evidenced by the postal receipt produced along with Ext.P4 series and the same was received by the revision petitioner evidenced by Ext.P5 postal acknowledgment. The accused had not paid the amount. So he had committed the offence punishable under Section 138 of the Act. Hence the complaint.

3. When the revision petitioner appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Exts.P1 to P5 were marked on his side. After closure of the complainant's evidence, the revision petitioner was questioned under Section 313 of the Code of

Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, he had CrI. R. P.No.1999 of 2014 3 not borrowed any amount from the complainant nor he had issued the cheque, as claimed by the complainant. In fact there was earlier transaction, in which a blank signed cheque was given along with one Vipin, which was mis-used and the present complaint was filed. But no evidence was adduced on his side to prove this fact. After considering the evidence on record, the trial court found the revision petitioner guilty under Section 138 of the Act and convicted him thereunder and sentenced him to undergo simple imprisonment for one month and also to pay 55,000/- as compensation to the complainant, in default to undergo simple imprisonment for one month more under Section 357(3) of the Code of Criminal Procedure. Aggrieved by the same, revision petitioner filed CrI.Appeal No.455/2011 before the Sessions Court, Palakkad, which was made over to Additional Sessions Court (Adhoc-I), Palakkad, for disposal and the same was dismissed by the Additional CrI. R. P.No.1999 of 2014 4 Sessions Judge, confirming the order of conviction and the sentence passed by the court below. Dissatisfied with the same, the present revision has been filed by the revision petitioner/accused before the court below.

4. Since, in spite of notice issued to the first respondent in the delay application, he did not appear, this court felt that, the revision can be admitted and disposed of on merit, after hearing the counsel for the revision petitioner and the Public Prosecutor, dispensing further notice to the first respondent in the revision. So the revision is admitted, heard and disposed of today itself.

5. The counsel for the revision petitioner submitted that, evidence of PW1 is not sufficient to prove the execution of the cheque and the courts below were not justified in convicting him for the offence alleged.

6. The learned Public Prosecutor supported the concurrent findings of the court below. CrI. R. P.No.1999 of 2014 5 7. The case of the complainant in the complaint was that, accused borrowed a sum of 55,000/- and in discharge of that liability he had issued Ext.P1 cheque. The accused had no case that, he had no transaction with the complainant, but according to him a blank signed cheque

given along with one Vipin for an earlier transaction to the complainant was mis-used and the present complaint was filed. In order to prove the case of the complainant, the complainant himself was examined as PW1 and he deposed in support of his case in the complaint. Though he was cross examined at length, nothing was brought out to discredit his evidence regarding the aspect of the revision petitioner borrowing the amount and issuing Ext.P1 cheque in discharge of that liability. No evidence was adduced on the side of the revision petitioner to prove his case. Further he did not send any reply to the notice issued by the complainant, when the cheque was dishonored by CrI. R. P.No.1999 of 2014 6 demanding the amount as well. That will go to show that, he did not send any reply, because he had no dispute regarding the allegations made in the notice.

8. It is settled law that, mere denial of the transaction or giving suggestions to the complainant, when he was examined that it was not issued in discharge any liability alone is not sufficient to rebut the presumption available under Section 138 of the Act. The burden is on the accused, to prove the circumstances under which the cheque has reached the hands of the complainant. If no such evidence is adduced, then court should draw the statutory presumption available under Section 139 of the Act and shall presume that the cheque was issued in discharge of a legally enforceable debt for the amount due from him to the complainant. This was so held in the decision reported in *Damodar S. Prabhu v. Sayed Babalal H.* [JT2010(4) (S.C.)457] and [2013(4) KLT CrI. R. P.No.1999 of 2014 7 350 (S.C.)] *Somanath Sarkar v. Utpal Basu Mallick*. So under the circumstances, in the absence of any evidence adduced on the side of the accused to rebut the presumption, courts below were perfectly justified in dis- believing the case of the revision petitioner and believing the evidence of the complainant, rightly came to the conclusion that, the accused had committed the offence punishable under Section 138 of the Act and convicted him for the said offence and the concurrent findings of the court below on facts on this aspect do not call for any interference.

9. As regards the sentence is concerned, the trial court sentenced him to undergo simple imprisonment for one month and also to pay 55,000/- as compensation to the complainant and in default to undergo simple imprisonment for one month under Section 357(3) of the Code of Criminal Procedure, which was confirmed by

the CrI. R. P.No.1999 of 2014 8 appellate court.

10. In the decision reported in Damodar S. Prabhu v. Sayed Babalal H. [JT2010(4) (S.C.)457], the Hon'ble Supreme Court has held that, cases under Section 138 of the Negotiable Instruments Act has basically of civil nature but a criminal colour has been given by the legislature, so as to make the drawer of the cheque to pay the amount and enable the payee of the cheque to recover the amount from the drawer of the cheque. Further it is also mentioned in the decision that, once the accused is found guilty, and then court must think of compensating the complainant for the loss sustained by him in the transaction by providing adequate compensation. Further in the decision reported in Somanath Sarkar's case cited (supra), the Hon'ble Supreme Court has held that, awarding compensation under Section 138 of the Act is not possible, but court has got power to impose double the cheque CrI. R. P.No.1999 of 2014 9 amount as fine and once the fine is quantified, then only the question of payment of compensation out of fine arises. In that decision, the Hon'ble Supreme Court has observed that, the payment of compensation to the complainant has to be taken into consideration by the courts below by fixing the fine to be payable and in those decisions it has been observed that, substantive sentence of imprisonment is not compulsory always in such case. So considering the circumstances and also considering the fact that the transaction is of the year 2008 and the cheque was issued in the year 2009, this court feels that the sentence can be modified by sentencing the revision petitioner to undergo imprisonment till rising of the court and also to pay a fine of 60,000/-, in default to undergo simple imprisonment for one month. If the fine amount is realized, the same be paid to the complainant as compensation under Section 357(1)(b) of the Code of Criminal Procedure and that will be CrI. R. P.No.1999 of 2014 10 sufficient and it will meet the ends of justice. So the revision petition is allowed in part and the order of conviction passed by the court below against the revision petitioner is hereby confirmed, but the sentence of one month simple imprisonment and direction to pay compensation of 55,000/- with default sentence of one month under Section 357(3) of the Code of Criminal Procedure are set aside and is modified as follows: The revision petitioner is sentenced to undergo imprisonment till rising of the court and also to pay a fine of 60,000/-, in default to undergo simple imprisonment for one month. If the fine amount is realized, the

same be paid to the complainant as compensation under Section 357(1)(b) of the Code of Criminal Procedure. Four months time is granted to the revision petitioner to pay the amount. So the revision petitioner is granted time till 21.03.2015 to pay the amount, till then the execution of sentence is Crl. R. P.No.1999 of 2014 11 directed to be kept in abeyance. If the revision petitioner pays the amount directly to the complainant and produces proof of payment and the complainant appears before the court below and acknowledges the receipt of the same, then court below is directed to treat the same as substantial compliance of payment of compensation out of fine and record the same in the respective registers and permit the revision petitioner to serve the substantive sentence of imprisonment till rising of the court as provided in the decision reported in (2010(2) KLT1017 Beena v. Balakrishnan Nair and Another and (2012(4) KLT21 Sivankutty v. John Thomas and Another. Office is directed to communicate this order to the concerned court, immediately. Sd/- K. Ramakrishnan, Judge // True Copy// P.A. to Judge ss

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