



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

FRIDAY, THE 24TH DAY OF NOVEMBER 2023 / 3RD AGRAHAYANA, 1945

CRL.REV.PET NO. 1107 OF 2017

AGAINST THE JUDGMENT DATED 07.07.2017 IN CRL.APPEAL NO.299/2015
OF SESSIONS COURT, MANJERI
ST 52/2013 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-II
(FOREST OFFENCES), MANJERI

REVISION PETITIONER/APPELLANT/ACCUSED NO.2:

SHANAVAS P., MANAGING PARTNER, FORTIS MARKETING,
CITY PLAZA, CENTRAL BAZAR, MANJERI, MALAPPURAM,
(MANJERI POLICE STATION LIMIT)

BY ADVS.

SRI.JOSEPH KURIAN VALLAMATTAM

SRI.LAL K.JOSEPH

SRI.V.S.SHIRAZ BAVA

RESPONDENTS/RESPONDENTS/COMPLAINANT:

1 M/S. BABIN TECHNOLOGIES PVT. LTD.,
KINFRA INDUSTRIAL TECHNO PARK, KAKKANCHERY,
MALAPPURAM DISTRICT, REPRESENTED BY ITS POWER OF ATTORNEY
HOLDER, SREEDARAN P., S/O VELAYUDHAN
KOTTAKKALA POST, MALAPPURAM DISTRICT.

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

R1 BY ADVS.

SRI.DENIZEN KOMATH

SRI.K.J.ABRAHAM

SRI.NIKHIL JOHN

R2 BY SMT.NIMA JACOB, PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 16.11.2023, THE COURT ON 24.11.2023 DELIVERED THE FOLLOWING:

**"CR"****ORDER**

This revision petition is at the instance of the 2nd accused in ST No.52 of 2013 on the file of Judicial First Class Magistrate-II, Manjeri, assailing the judgment in Crl.Appeal No.299 of 2015 on the file of Sessions Court, Manjeri, which upheld his conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred as 'the NI Act'), though his substantive sentence of six months was reduced into a single day till rising of court, while retaining the fine amount and its default sentence.

2. ST No. 52 of 2013 was based on a private complaint filed by the complainant/1st respondent, a Private Limited Company, by name M/s.Babin Technologies Pvt.Ltd., for dishonour of Exts. P2 and P3 cheques signed and issued by the revision petitioner (A2) in his capacity as the managing partner of M/s.Fortis Marketing (A1).

3. On appearance of the accused before the trial court, particulars of offence was read over and explained, to which they



pleaded not guilty. Thereupon, PWs 1 and 2 were examined and Exts.P1 to P11 were marked from the side of the complainant/1st respondent. On closure of complainant's evidence, the accused were questioned under Section 313 of Cr.P.C. and they denied all the incriminating circumstances brought on record. Exts.D1 to D5 were marked as exhibits from defence side.

4. On analysing the facts and evidence and on hearing the rival contentions from either side, the trial court found both the accused guilty under Section 138 of the NI Act and they were convicted thereunder. Since the 1st accused was a partnership firm and the 2nd accused was its managing partner, no separate sentence was awarded on the 1st accused. The revision petitioner (A2) was sentenced to undergo simple imprisonment for a period of six months and fine of Rs.3,99,500/- with a default sentence of simple imprisonment for a further period of six months.

5. Aggrieved by the conviction and sentence, the revision petitioner (A2) preferred Crl. Appeal No. 299 of 2015, and the appellate court dismissed the appeal, finding no reason to interfere with the conviction and sentence imposed on the



revision petitioner (A2) by the trial court, against which he has preferred this revision.

6. At this juncture, it is pertinent to note that no appeal has been preferred by the 1st accused firm against the conviction under Section 138 of the NI Act, and hence it has become final.

7. Now this Court is called upon to verify the legality, propriety and correctness of the conviction and sentence imposed on the revision petitioner.

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

9. Learned counsel for the revision petitioner is challenging the competence of PW1 to prefer the complaint on behalf of the complainant company, on the strength of Ext.P1 power of attorney. According to him, Ext.P1 power of attorney was executed by the Managing Director of the complainant company, and the resolution of the company which authorised the Managing Director to execute such a power of attorney was not produced, to show that the Managing Director was empowered to execute such a power of attorney in favour of PW1. But PW1



deposed that the company resolved to authorise the Managing Director, for issuing power of attorney in favour of PW1. Moreover, he was the PRO of that company and he was aware of the disputed transactions, and he was competent to give evidence as an agent of the company, on the strength of Ext.P1. The revision petitioner is representing the 1st accused, as its managing partner. The 1st accused was convicted under Section.138 of the NI Act, finding competency of PW1 to file the complaint as well as to give evidence, with respect to the disputed transaction. Since the 1st accused has opted not to challenge the conviction based on the factual findings of the trial court, the revision petitioner, who is representing the firm as its managing partner, cannot take up a contention exceeding the contentions of the firm, which he is representing.

10. It is trite law that a complaint alleging commission of offence under Section 138 of the NI Act can be presented through the power of attorney holder, and the power of attorney holder can depose and verify on oath before the court, in order to prove the contents of the complaint, provided he has witnessed



the transaction as an agent of the payee. Though in the power of attorney, it is not stated that PW1 was an employee in the company, in the affidavit accompanying the power of attorney, as well as in the proof affidavit filed by him, his occupation is shown as company PRO. When PW1 was cross-examined by the accused, there was a suggestion to the effect that he had no employment in the company, which he denied emphatically. The evidence adduced by PW1 gives clear indication that he was fully aware of the transaction involved in this case, and so, apart from presenting the complaint, he was competent to give evidence also, to prove the contents of the complaint, on the strength of the power of attorney.

11. In **Narayanan A.C. and Another v. State of Maharashtra and Others [2013 (3) KHC 885]**, the Apex Court held that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the NI Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the



transactions, and then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant-payee and the attorney holder alone is personally aware of the transaction, there is no reason why the attorney holder cannot depose as a witness.

12. In **Popular Motor Corporation v. State of Kerala [2023 (6) KLT 7]**, this Court held that Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. Thus in every complaint, where the complainant is an incorporeal body, there is



complainant-de jure, and a complainant-de facto. When in a complaint in regard to dishonour of a cheque issued in favour of a company or corporation, for the purpose of Section 142 of the NI Act, the company will be the complainant, and for purposes of Section 200 of the Code, its employee who represents the company or corporation, will be the de facto complainant. In such a complaint, the de jure complainant, namely, the company or corporation will remain the same but the de facto complainant (employee) representing such de jure complainant can change, from time to time. When a company is the payee of the cheque based on which a complaint is filed under Section 138 of the NI Act, the complainant necessarily should be the Company which would be represented by an employee who is authorised. *Prima facie*, in such a situation the indication in the complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorised person who has knowledge, would be sufficient. The employment of the terms "specific assertion as to the knowledge of the power of attorney holder" and such assertion about knowledge should



be "said explicitly" as stated in **Narayanan A.C.'s** case cited (*Supra*) cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the "payee" and if the person who is prosecuting the complaint is different from the payee, the authorisation therefore and that the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorised employee can represent the company. Such averment and *prima facie* material are sufficient for the learned Magistrate to take cognizance and issue process.

13. In **TRL Krosaki Refractories Ltd. (M/s.) v. SMS Asia Pvt. Ltd. and Another [2022 (2) KHC 157]**, a three Judge Bench of the Apex Court held that when a company is the payee of the cheque based on which a complaint is filed under Section 138 of NI Act, the complainant necessarily should be the Company which would be represented by an employee who is authorised. *Prima facie*, in such a situation, the indication in the



complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorised person, who has knowledge, would be sufficient. The employment of the terms "specific assertion as to the knowledge of the power of attorney holder" and such assertion about knowledge should be "said explicitly" as stated in **Narayanan A.C.'s** case cited (*Supra*) cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorised or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial.

14. The revision petitioner was convicted and sentenced, he being the managing partner of the 1st accused. Exts.P2 and P3 cheques show that the revision petitioner signed those cheques



in his capacity as the managing partner and not in his personal capacity. Obviously, the amount was due to the 1st respondent/complainant from the 1st accused-firm and the revision petitioner (A2) had no personal liability towards the 1st respondent/company so as to issue the cheques. Moreover, the account from which the cheques were drawn belonged to the 1st accused-Fortis Marketing. PW2, the Manager of SBT, Manjeri, deposed before court that the cheques were drawn from the account of Fortis Marketing, maintained in his bank, and as on 15.12.2012, the balance available in that account was only Rs.2,38,802/-. Since the cheques were issued from the bank account of Fortis Marketing, the revision petitioner cannot be prosecuted personally under Section 138 of the NI Act, though the cheques bear his signature in his capacity as the managing partner. So, the liability of the revision petitioner was vicarious, co-extensive with that of the 1st accused. In case the company/firm is found not guilty of the offence alleged under Section 138 of the NI Act, then the managing partner, who signed and issued the cheques in his capacity as the managing



partner, cannot be convicted under Section 138 of the NI Act. Likewise, when there is no dispute with respect to the fact that the revision petitioner was the managing partner of the 1st accused, and he issued the cheques in his capacity as the managing partner, when the 1st accused firm is convicted, and the firm is not challenging that conviction, then the managing partner cannot escape from the liability of the firm, and he cannot have a defence more than that of the firm.

15. It is worth quoting Section 141 of the NI Act which reads thus:

“141. Offences by companies

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

PROVIDED that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:....”



16. In **Pramod v. Velayudhan [2005 (4) KLT Short Note Page No.96 Case No.128]**, this Court considered when can the persons referred to in Section 141 of the NI Act be held liable for offence under Section 138 of the Act?. To hold such person guilty of offence under Section 138 of the Act, he need not commit offence under Section 138 of the NI Act by himself. He need not draw any cheque. He need not maintain any account with any banker. He need not order to pay any amount to any person. The dishonoured cheque need not be the one which is issued by him. In short, he need not do any act attracting offence under Section 138 of the NI Act. Still, such a person referred to in Section 141 of the NI Act can be held guilty of offence under Section 138 of the NI Act. From a reading of Section 141 of the NI Act, it is clear that to hold a person guilty of offence under Section 138 of the NI Act, by virtue of Section 141 of the NI Act, the first and foremost requirement to be established is commission of the offence by another person ie., a company, firm or association of individuals. Unless and until it is established that such juristic person commits offence under Section 138 of the NI



Act, no person referred to in Section 141 of the NI Act can be proceeded against, summoned, prosecuted or convicted for offence under Section 138 of the NI Act. In other words, commission of offence under Section 138 of the NI Act by a juristic person is an inevitable legal pre-requisite or the condition precedent to proceed against a person referred to under Section 141 of the NI Act and to hold him guilty of the said offence. It is thus clear that a person referred to in Section 141 of the NI Act can be prosecuted and convicted for an offence committed by another person.

17. Here the case on hand poses a different question which is just opposite to the position considered in **Pramod's** case cited (Supra). Here it is proved that the firm committed the offence under Section 138 of the NI Act, and it was found guilty and convicted. That conviction was never challenged, and it has become final. If so, whether the vicarious liability of its managing partner can be brushed aside, in an appeal filed by him is the question here. The answer should be no. When the firm is convicted under Section 138 of the NI Act, and it has become



final, its managing partner who issued the cheque, in his capacity as its managing partner becomes vicariously liable for the offence committed by the firm, and he cannot have any fresh defence against the 1st respondent/complainant, which the firm did not raise during the trial, and he cannot re-agitate any contention already taken up by the firm and found against. After taking into account all the contentions and pleas from the part of the 1st accused firm, the trial court convicted the company, and the conviction has become final also. So the managing partner is not supposed to challenge the findings of the trial court, which led to the conviction of the firm. Further, he cannot have any defence other than the defence taken by the firm, as he has no case that, he is eligible to get protection of the proviso under Section 141 of the NI Act. So, also the revision is not maintainable.

18. The revision petitioner put forward another contention that there was no legally enforceable debt due from the 1st accused towards the 1st respondent-company. According to him, while financial disputes were pending between the complainant company and 1st respondent/firm, Exts. P2 and P3 cheques were



issued. But the evidence given by PW1 is sufficient to show that in connection with some offers declared for the sub-dealers of the complainant company, the 1st accused-firm raised some disputes and it was pending during the period of issuance of the cheques. But Exts.P2 and P3 cheques were issued towards the price of articles purchased from the complainant company by the 1st accused-firm as deposed by PW1. Moreover, in Ext.D4 letter issued by the 1st accused-firm to the complainant company on 12.12.2012, it is categorically admitted that Exts.P2 and P3 cheques were issued towards the price of articles purchased by the 1st accused from the complainant company, during the period 16.04.2012 - 30.11.2012. The number of those cheques, the amount covered etc. are clearly mentioned in Ext.D4 letter. So now the revision petitioner cannot turn round and say that Exts.P2 and P3 cheques were not issued towards discharge of any legally enforceable debt. Moreover, the 1st accused-firm, who purchased those articles and issued Exts.P2 and P3 cheques through its managing partner, stands convicted under Section 138 of the NI Act, and it has become final also. So, the revision



petitioner (A2) cannot take up that contention any more.

19. For the aforementioned reasons, the revision petition is liable to be dismissed as it is devoid of any merits. In the result, the revision fails and hence dismissed.

The revision petitioner is directed to appear before the trial court on or before 12.12.2023 to receive the sentence and to pay the fine, and 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, for executing the sentence without further delay.

Sd/-
SOPHY THOMAS, JUDGE

DSV/-