



CRL.R.P NO.652 OF 2018

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2024:KER:75157

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.B. SNEHALATHA

WEDNESDAY, THE 9TH DAY OF OCTOBER 2024 / 17TH ASWINA, 1946

CRL.REV.PET NO. 652 OF 2018

AGAINST THE JUDGMENT DATED 08.08.2017 IN CRL.A NO.372 OF 2015 OF ADDITIONAL SESSIONS COURT - VIII, ERNAKULAM ARISING OUT OF THE JUDGMENT DATED 11.09.2015 IN CC NO.6251 OF 2010 OF JUDICIAL MAGISTRATE OF FIRST CLASS - IV, ERNAKULAM

REVISION PETITIONER/APPELLANT/ACCUSED:

BEENA KURUVILA
AGED 58 YEARS, PROPRIETOR, M/S MADAPARAMBIL
ENTERPRISES, MARKET P.O., VELLOORKUNNAM,
MUVATTUPUZHA, RESIDING AT MADAPARAMBIL HOUSE, MARKET
P.O., VELLOORKUNNAM, MUVATTUPUZHA, ERNAKULAM.

BY ADVS.

SRI.M.B.SANDEEP

SMT.R.ANJANA

SMT.C.C.BINDHYA

SRI.M.J.KIRANKUMAR

SMT.R.PRIYA

SRI.B.SURJITH

SMT.K.P.SREEJA

SMT.SHERIN VARGHESE

RESPONDENTS/RESPONDENTS/COMPLAINANT AND STATE:

- 1 M/S.STANDARD CHARTERED BANK
HDFC HOUSE, M.G.ROAD, RAVIPURAM, ERNAKULAM, COCHIN -
682 015, REPRESENTED BY ITS POWER OF ATTORNEY
HOLDER, SAJEESH DHANAN K, AGED ABOUT 38 YEARS,
S/O. JANARDHANAN.
- 2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031.
BY ADV SRI.B.S.SURESH KUMAR
SRI.SANAL P.RAJ-PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
HEARING ON 11.9.2024, THE COURT ON 9.10.2024 DELIVERED THE
FOLLOWING:



CR

M.B.SNEHALATHA, J

Crl.R.P.No.652 of 2018

Dated this the 9th day of October, 2024

ORDER

Revision Petitioner, who is the accused in C.C.No.6251/2010 on the file of Judicial First Class Magistrate Court IV, Ernakulam assails the judgment of conviction and order of sentence against him in Crl.A No.372/2015 of Sessions Court, Ernakulam (Sessions Court VIII) for the offence punishable under Section 138 of Negotiable Instrument Act, 1881 (hereinafter referred to as 'N.I Act').

2. The parties shall be referred to as complainant and accused.

3. The complainant M/s.Standard Chartered Bank instituted the complaint alleging that in partial discharge of the amount due to the said bank, accused issued Exts.P2 and P3 cheques of ₹91,009/- each drawn on Federal Bank Ltd., Muvattupuzha Branch in favour of the complainant bank. Though the complainant presented Exts.P2



and P3 cheques for encashment, the said cheques were dishonoured due to insufficient funds in the account of the accused. Though the accused accepted Ext.P5 lawyer notice, she failed to repay the amount covered by the said cheques and thereby committed the offence punishable under Section 138 of N.I.Act.

4. Accused pleaded not guilty to the accusation and denied issuance of Exts.P2 and P3 cheques in discharge of any debt or liability. The defence canvassed by the accused was that at the time of availing loan from the complainant bank, the bank had obtained 32 signed cheques from her as a security to the loan and Exts.P2, P3 are two of such cheques misused by the complainant.

5. Evidence consists of the oral testimonies of PW1, DW1 and documents marked as Exts.P1 to P7 and Exts.D1 to D4.

6. After trial, the learned Magistrate found the accused guilty of the offence punishable under Section 138 N.I Act and he was convicted and sentenced to pay a fine of ₹2 lakhs and in default of payment of fine, to undergo simple imprisonment for a period of three months with a further direction that if the fine amount is realised, the entire amount shall be paid to the complainant as compensation under Section 357(1)(b) Cr.P.C.



7. In the appeal preferred by the accused as Crl.A No.372/2015, the learned Sessions Judge, confirmed the conviction but altered the sentence and the accused was sentenced to undergo imprisonment till the rising of the court and to pay a fine of ₹2 lakhs and in default of payment of fine to undergo simple imprisonment for one month with a direction that the fine amount if realised shall be given to the complainant as compensation under Section 357(1) (b) Cr.P.C.

8. The learned counsel for the revision petitioner contended that there was no valid consideration for Exts.P2, P3 cheques that Exts.P2, P3 cheques were given as security at the time of availing the loan; that the trial court and the appellate court failed to appreciate Ext.D4 series receipts which would show that the accused made subsequent payments to the loan after the issuance and dishonour of Exts.P2, P3 cheques.

9. The point for consideration in this revision is whether the judgment impugned needs any interference by this Court.

10. PW1, who was examined on the side of the complainant Bank has testified that the accused, who was a customer of the said bank had availed a loan of ₹25 lakhs from the



said bank agreeing to repay the same in instalments. In partial discharge of the amount due to the complainant bank, accused issued Ext.P2 cheque dated 1.11.2008 and Ext.P3 cheque dated 1.1.2009 of ₹91009/- each drawn on Federal Bank Ltd., Muvattupuzha Branch; that upon presentation of Exts.P2 and P3 cheques, both cheques were dishonoured due to insufficient funds in the account of the accused. Ext.P4 is the memo issued from the bank. Ext.P5 is a copy of the lawyer notice sent to the accused. Exts.P6 and P7 are the acknowledgement cards. According to PW1, in spite of receipt of Ext.P5 lawyer notice, accused failed to pay the amount covered by Exts.P2 and P3 cheques.

11. The contention of the accused is that at the time of availing the loan, the bank had obtained 32 signed cheques as a security to the loan and Exts.P2 and P3 are two of such cheques misused by the complainant. Accused would admit the issuance of Exts.P2 and P3 cheques, though she would deny the consideration.

12. It is a well settled principle that even if a cheque is issued as a security for a liability and unless that liability was discharged, the holder of the cheque can present the cheque for collection and if it is dishonoured, the offence under Section 138 N.I.



Act would attract.

13. The evidence adduced by the complainant bank would show that accused issued Exts.P2, P3 cheques in discharge of the liability to the bank.

14. Yet another contention taken by the accused is that after Exts.P2, P3 cheques were drawn, but before the cheques were dishonoured and the institution of the complaint, she had made certain payments towards the debt and therefore, the complainant ought not to have presented Exts.P2, P3 cheque for encashment without recording the part payment and if the unendorsed cheque is dishonoured for presentation, the offence under Section 138 N.I Act would not be attracted since the cheque does not represent a legally enforceable debt. In support of the said argument, the learned counsel for the accused placed reliance on the decision of the Hon'ble Supreme Court reported in *Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel and Another* (2022(7)KHC 61) wherein the Apex Court held that (para 29) when a part payment of the cheque is made after the cheque is drawn, but before the cheque is encashed, such payment must be endorsed on the cheque under [Section 56](#) of the Act. The cheque cannot be presented for



encashment without recording the part payment and if the unendorsed cheque is dishonoured on presentation, the offence under Section 138 of N.I. Act would not be attracted since the cheque does not represent a legally enforceable debt at the time of encashment.

15. To substantiate the contention of the accused that she effected certain payments to the bank towards the loan after the cheques were drawn but before the cheques were presented for collection, she has produced Ext.D4 series receipts, which would show that she has effected certain payments during the period from 1.11.2008 to 2.1.2009. But it is to be borne in mind that the accused failed to adduce any evidence to show that the amount which she paid by virtue of Ext.D4 series receipts were part payments of the amounts covered by Exts.P2 and P3 cheques. In the absence of any such evidence, the contention of the accused that she made part payment of the debt before Exts.P2, P3 cheques were presented for collection, cannot be accepted.

16. Section 118(a) of N.I Act provides that until the contrary is proved, it shall be presumed that every negotiable instrument shall be 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.

17. In view of the express provision of Section 139 of N.I. Act, a presumption must be drawn that the holder of the cheque received the cheque, of the nature referred to in Section 138, for the discharge of any debt or other liability unless the contrary is proved that there was no legally enforceable debt or liability. The presumption under Section 139 of N.I Act is a rebuttable presumption. Accused failed to rebut the said presumption.

18. The evidence on record would show that Exts.P2, P3 cheques issued by the accused to the complainant were dishonoured due to insufficient funds in the account of the accused and even after receipt of Ext.P5 notice, accused failed to pay the amount covered by Exts.P2, P3 cheques. Hence, there is no reason for this Court to interfere with the finding rendered by the learned Magistrate and the learned Sessions Judge that the accused has committed the offence punishable under Section 138 of the N.I Act. Therefore, I find no reason to interfere with the finding of conviction against the accused for the offence under Section 138 N.I.Act.



19. Now let us see whether the sentence which was modified by the Sessions Court in appeal warrants any interference by this Court.

20. The learned Magistrate sentenced the accused to pay a fine of ₹2 lakhs and in default of payment of fine, to undergo simple imprisonment for a period of three months. It was also directed that the entire fine amount, if realised shall be given to the complainant as compensation under Section 357(1)(b) Cr.P.C.

21. In the appeal, the learned Sessions Judge modified the sentence and the accused was sentenced to undergo imprisonment till the rising of the court and to pay a fine of ₹2 lakhs. In default of payment of fine, to undergo simple imprisonment for one month with a direction that fine amount if realised, shall be given to the complainant as compensation under Section 357(1)(b) Cr.P.C.

22. It is to be borne in mind that the trial court had not awarded any substantive sentence of imprisonment. Whereas, in the appeal filed by the accused, apart from the fine of ₹2 lakhs, the learned Sessions Judge awarded substantive sentence of imprisonment till the rising of the court also. Thus, the learned



Sessions Judge has enhanced the punishment in an appeal filed by the accused.

23. Section 386 Cr.P.C which deals with the powers of appellate court is extracted below:

"386. Powers of the appellate court.

After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
- (b) in an appeal from a conviction -
 - (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
 - (ii) alter the finding, maintaining the sentence, or
 - (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;
- (c) in an appeal for enhancement of sentence -
 - (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
 - (ii) alter the finding maintaining the sentence, or
 - (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
- (d) in an appeal from any other order, alter or reverse such order;
- (e) make any amendment or any consequential or incidental order that may be just or proper;"



24. In an appeal from conviction, the appellate court may reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction subordinate to such appellate court or committed for trial or it can also alter the finding, maintaining the sentence or with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same. (emphasis supplied by me)

25. Section 386(b)(iii) of Cr.P.C expressly bar the appellate court from enhancing the sentence in an appeal filed by the accused from a conviction.

26. In the case on hand, the learned Sessions Judge enhanced the sentence by awarding substantive sentence of imprisonment till the rising of the court. Hence, the sentence awarded by the appellate court needs interference by this Court. The sentence awarded by the learned Magistrate shall be maintained.

27. Hence this Crl.Revision Petition is allowed in part as follows:

a) The conviction of the accused for the offence



under Section 138 of N.I Act is confirmed.

b) The sentence against the accused is modified as follows:

Accused is sentenced to pay a fine of ₹2 lakhs. In default of payment of fine, he shall undergo simple imprisonment for three months. If the fine amount is realised, the whole amount shall be paid to the complainant as compensation under Section 357(1)(b) Cr.P.C.

The trial court shall take steps to execute the sentence.

Registry shall transmit the records to the trial court forthwith.

Sd/-

M.B.SNEHALATHA

JUDGE

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