



2024/KER/8951

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 7<sup>TH</sup> DAY OF FEBRUARY 2024 / 18TH MAGHA, 1945

CRL.REV.PET NO. 741 OF 2016

AGAINST THE JUDGMENT DATED 05.10.2013 IN CC 1168/2009 OF JUDICIAL  
MAGISTRATE OF FIRST CLASS-III, PALAKKAD

CRA 331/2013 OF ADDITIONAL SESSIONS COURT - V, PALAKKAD

REVISION PETITIONERS/APPELLANTS/ACCUSED NOS.1, 2 & 6:

1 PADMA CONDUCTORS PVT. LTD

[REDACTED]

2 RAJ KUMAR NAIR

[REDACTED]

3 MS.AMBADY ELECTRONICS

[REDACTED]

BY ADV SRI.V.A.JOHNSON (VARIKKAPPALLIL)

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 MIRC ELECTRONICS

REPRESENTED BY ITS BRANCH ACCOUNTANT BRANCH OFFICE

[REDACTED]

2 STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM - 682 031.

R1 BY ADV SRI.JACOB CHACKO  
SENIOR PUBLIC PROSECUTOR SHRI K DENNY DEVASSY

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON  
16.01.2024, THE COURT ON 07.02.2024 THE SAME DAY DELIVERED THE  
FOLLOWING:

**“C.R”*****A. BADHARUDEEN, J.***

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*Crl.R.P.No.741 of 2016*

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*Dated this the 7<sup>th</sup> day of February, 2024****ORDER***

This Revision Petition has been filed under Sections 397 and 401 of the Code of Criminal Procedure. The revision petitioners are accused Nos.1,2 and 6 in C.C.No.1168/2009 on the files of the Judicial First Class Magistrate No.III, Palakkad. The revision petitioners assail judgment dated 05.10.2013 in the above case as well as the judgment in Crl.Appeal No.331/2013 before the Additional Sessions Court-V, Palakkad. The respondents herein are the complainant as well as the State of Kerala.

2. Heard the learned counsel for the revision petitioners as well as the learned counsel for the respondents in detail. Perused the lower court records.

3. I shall refer the parties in this Revision Petition as 'complainant' and 'accused' for convenience.



4. The complainant lodged complaint alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act ('N.I Act' for short) contending that the complainant used to supply electrical equipments and products to the 6<sup>th</sup> accused on behalf of accused 1 to 5 and the 1<sup>st</sup> accused issued cheque for Rs.7,83,929.50 dated 18.04.2009 drawn on South Indian Bank signed by the 2<sup>nd</sup> accused as the Director of the 1<sup>st</sup> accused for discharging the liability of the 6<sup>th</sup> accused, as on 18.04.2009. On presentation of the cheque, the same got dishonoured for want of funds. Consequently, notice of dishonour was issued and the amount covered by the cheque was demanded, but the accused did not heed the demand.

5. The trial court took cognizance of this matter and issued summons to the accused and proceeded with trial on compliance of the legal formalities.

6. During trial PW1 examined and Exts.P1 to P21 were marked on the side of the complainant. Exts.D1 to D2 were marked as defence evidence.

7. On hearing both sides, the learned Magistrate found that accused Nos.3, 4 and 5 were not guilty, while holding that accused Nos.1,



2 and 6 were guilty for the offence punishable under Section 138 of the N.I Act and accused 1 and 6 were sentenced to pay compensation of Rs.7,83,929.50 equally to the complainant under Section 357(3) of Cr.P.C. The 2<sup>nd</sup> accused was sentenced to undergo simple imprisonment for a period of 2 years.

8. On appeal, the learned Sessions Judge concurred the finding of conviction while modifying the sentence imposed against the 2<sup>nd</sup> accused to 7 months.

9. While assailing concurrent verdicts of conviction and sentence, the learned counsel for accused 1, 2 and 6/revision petitioners submitted that in this matter, the transaction, issuance and execution of Ext.P2 cheque not at all proved, as mandated by law. The learned counsel also submitted that the complaint was filed by MIRC Electronics Limited represented by its Branch Accountant Albi. At the time of evidence, one Pradeep Menon, S/o.Achuthannair, was examined to prove the transaction, issuance and execution of the cheque and he was the power of attorney holder of the company and he did not have any direct knowledge regarding the transaction, issuance or execution of the cheque and, therefore, his evidence is quite insufficient to prove the transaction and execution of



Ext.P2 by the accused as contended by the complainant and for the sole reason the complainant failed to discharge his initial burden in the matter of transaction led to execution of Ext.P2. Therefore, the conviction and sentence imposed by the trial court and modified by the appellate court deserve interference and accused 1, 2 and 6 are liable to be acquitted.

10. The learned counsel for accused 1, 2 and 6 placed decisions of this Court reported in [2016 (3) KHC 229 : 2016 (2) KLD 180 : 2016 (2) KLJ 792 : ILR 2016 (3) Ker. 243 : 2016 (3) KLT SN 62], ***Sukumaran P.N v. K.N.Madhavan Nair & Ors.*** and [2022 KHC 548 : 2022 (5) KHC SN 14 : 2022 (2) KLD 343 : 2022 KHC OnLine 548 : 2022(4) KLT 592 : 2022 (3) KLJ 573], ***Shibu L.P v. Neelakantan & another*** to buttress his argument in this line. In ***Shibu L.P v. Neelakantan & another***'s case (*supra*), in paragraph 15, this Court, after referring an Apex Court decision on the point, held as under:

*“15. In the decision reported in (2013 (4) KLT 21 (SC) : 2013 (2) KLD 539 : 2013 (4) KLJ 279 : AIR 2014 SC 630 : 2014 CriLJ 576 : (2014) 11 SCC 790 : 2013 (3) KHC 885), Narayanan A.C. & Anr. v. State of Maharashtra & Ors., 3 Bench of the Apex Court considered filing of a complaint by the power of attorney and the nature of evidence of the power of attorney required to prove the transaction. In the said case, the Apex Court settled the following principles:*



*“(i) Filing of complaint petition under Section 138 of NI Act through power of attorney is perfectly legal and competent.*

*(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.*

*(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.*

*(iv) In the light of Section 145 of NI Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the NI Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the NI Act.*

*(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.”*

*Thus the law is settled on the point that a complaint alleging commission of offence under S.138 of the Negotiable Instruments 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. However, the power of attorney holder must have witnessed the transaction as an agent of the payee or holder in due course or possess due knowledge regarding*



*the said transaction. It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who had no knowledge regarding the transactions cannot be examined as a witness in the case.”*

11. The legal position in as much as the evidence to be given by the power of attorney holder is as extracted herein above and the same is not in dispute. Now the question poses for consideration is whether the evidence of PW1 in this case being the branch accountant of the company, who did not have any knowledge regarding the transaction led to execution of Ext.P2 cheque, is sufficient to discharge the initial burden cast upon the complainant to prove the transaction and execution of the cheque. In the chief affidavit filed by the complainant, it was affirmed by PW1 in the affirmation portion and in paragraphs 1 and 2 stated as under:

*“I, Pratap Menon, S/o.M.K.Achuthan Nair, aged 47 years, Branch Accountant, M/s.MIRC Electronics Ltd., having its Regd Office at Onid House G-1, M.I.D.C, Mahakali Caves Road, Andheri (east), Mumbai, and its branch office at Onida House, M.S and S chambers, No.XII/992, 993, Civil Line Road, Padamughal, Thrikkakara, Ernakulam, do hereby solemnly affirm and state as follows:*

*“1. I am the Branch Accountant of the complainant company and I am conversant with the facts of the case.*

*2. The complainant MIRC Electronics Ltd., is a Company incorporated under the provisions of the Companies Act*



*1956 and is having its registered office at G-1, MIDC Onida House, Mahakali Caves Road, Andheri (E), Mumbai 400 093 and is engaged in the business of manufacturing and marketing of televisions, washing machines, microwave over etc. under the name and style ONIDA and IGO.”*

12. When PW1 was cross examined, PW1 given evidence that he had been working in the company for the last 3 years and he did not know the transaction between the company and accused directly and he came to know about the transaction only after his appointment. Further his evidence is that he did not know the direct role of Accused 1 to 5 in the partnership. But he understood the same through records. His further version is that as per the records he understood that they involved in marketing and manufacturing of electronic equipments. When a question was asked as to whether accused 3 to 5 placed orders, his answer was 'might be'. Then he added that he did know that accused 3 to 5 involved in this matter. But he did not witness the same. His evidence further is that he was not at the office at the time when Ext.P2 was executed. But in Ext.P2, the 2<sup>nd</sup> accused put the signature. He also deposed that he was not present at the time of execution of the cheque and he did not know who wrote the cheque and he produced the cheque from office records.





13. In this case, going by the evidence of PW1 it is discernible that PW1 not given evidence as the power of attorney holder of the company and he had given evidence as the branch accountant of the complainant company, familiar with the facts of this case.

14. Even though PW1 is not the power of attorney holder of the company, during cross examination his evidence is that he did not know the transaction, who signed the cheque, and executed the cheque, directly. He also did not know who wrote the cheque. Going by paragraph 8 of the judgment of the trial court, it was observed that PW1 given evidence, on perusing records after he joined the company, that he had given evidence that as regards the role of accused 2 to 5, he did not have any direct knowledge.

15. Coming to the appellate court judgment, in paragraph No.10, the appellate court also recorded that PW1 was authorised to represent the company by virtue of Ext.P20 resolution of the board of meeting. In para.11 of the appellate judgment, the learned Sessions Judge addressed the contention raised by the learned counsel for the petitioners to the effect that Ext.P2 cheque was not proved by the complainant since PW1 had no direct knowledge regarding the alleged transaction between the parties. In



paragraph 15, the appellate court found that during cross examination, PW1 given evidence that he was working in the company for the last 3 years and he had direct knowledge about the transaction after he joined the company.

16. In fact, the trial court as well as the appellate court relied on the evidence of PW1, to hold that he had direct knowledge regarding the transaction led to execution of Ext.P2 cheque. In so far as the initial burden cast upon the complainant, in a prosecution alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act, is concerned, the same shall be discharged by proving the transaction which led to execution of the cheque. In the instant case, obviously, the transaction was prior to the appointment of PW1 in the company. So he had no direct knowledge regarding the transaction. Holding the view that since the complainant is a company, it may be difficult to examine the persons who had direct knowledge with regard to the transaction, then also, the burden to prove the issuance and execution of the cheque with certainty, would be upon the complainant and for which somebody who witnessed issuance and execution of the cheque should have been examined.



17. Even though the contention raised by the learned counsel for accused 1, 2 and 6 is that, PW1 examined in this case is the power of attorney holder, who had no direct knowledge, in fact, PW1 is not the power of attorney holder of the company. However, in order to prove the transaction led to execution of the a cheque, somebody who should have direct knowledge regarding the transaction, issuance and execution of the cheque must be examined. When the complainant limits the evidence as that of an officer of a company, who did not have any direct knowledge regarding the transaction and he did not witness the execution of the cheque, the evidence is insufficient to discharge the initial burden cast upon the complainant. So, it could not be held that the complainant succeeded in discharging his initial burden, to avail the benefit of presumptions under Sections 118 and 139 of the N.I.Act.

18. In this context, it is argued by the learned counsel for the complainant that in Ext.D1 the transaction is admitted and, therefore, reading the evidence of PW1 along with Ext.D1, the transaction and consequential issuance of Ext.P2 cheque stood proved. In view of this contention, I have perused Ext.D1 reply notice issued to Alby, the Branch Accountant of the company, at the instance of Sri Raj Kumar Nair,



Director of Padma Conductors Pvt. Ltd., dated 28.05.2009. In Ext.D1, the averment in the legal notice as to issuance of Cheque No.892287 dated 18.04.2009 for an amount of Rs.7,83,929.50 drawn on South Indian Bank, Palakkad, was denied and a specific contention was raised to the effect that the above cheque was issued only affixing his signature and was given as a security vide covering letter dated 14.07.2009 with an undertaking that the same would not be misused without express consent of the party. Further, all the averments in the notice were specifically denied. So on no stretch of imagination it could be held that in Ext.D1 reply notice the accused admitted the transaction.

19. However, a very relevant aspect is, when PW1 was cross examined, a pertinent question was asked regarding the amount of the cheque. PW1 answered that the cheque amount is the amount due as per the statement of accounts. But Ext.P4 is the account statement dated 26.06.2009 and Ext.P5 is the account statement dated 06.12.2008. As per Ext.P4, as on 09.05.2009, the closing balance is Rs.7,83,929.50 and as per Ext.P5, as on 24.11.2008, the closing balance was Rs.2,83,950/-. Thus, the balance outstanding as on the date of the cheque is proved by Ext.P4.



20. Even though re-appreciation of evidence is not legally permitted in a revision filed in a case where the substantial legal question as regards failure to prove the transaction and execution of cheque is directly in question, this Court is bound to peruse the records.

21. On analysis of the materials, it is discernible that the complainant in this case failed to prove the transaction led to execution of Ext.P2 cheque and thereby to discharge the initial burden on the complainant so as to avail the presumptions under Sections 118 and 139 of the N.I Act. However, as per Ext.P4, the balance outstanding is tallying with the cheque amount. Therefore, this Court is of the view that one more opportunity to be given to the complainant to prove the transaction, issuance and execution of Ext.P2 cheque and for the said purpose, the conviction and sentence imposed by the trial court and confirmed by the appellate court are liable to be set aside.

In the result, this Criminal Revision Petition stands allowed. The conviction and sentence imposed by the trial court against the revision petitioners/accused Nos.1, 2 and 6 stand set aside and the matter remanded back to the trial court for fresh consideration after permitting the complainant to adduce further evidence in respect of the transaction,



issuance and execution of Ext.P2, keeping the evidence already recorded, in tact. Needless to say that the accused also will get opportunity to defend the case, in view of the additional evidence to be adduced by the complainant.

Parties shall appear before the trial court on 15.2.2024. Since the matter is of the year 2009, the trial court is directed to expedite the trial and finish the same, at any rate, within a period of two months from the date of receipt of a copy of this order.

Registry shall inform this matter to the trial court forthwith.

Sd/-

**(A.BADHARUDEEN, JUDGE)**

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