IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 17TH DAY OF OCTOBER 2023 / 25TH ASWINA, 1945

CRL.A NO. 1412 OF 2011

AGAINST THE ORDER/JUDGMENT OTHERS 581/2011 OF HIGH COURT OF KERALA

CC 507/2008 OF CHIEF JUDICIAL MAGISTRATE, ALAPPUZHA

APPELLANT/S:

POPULAR MOTOR CORPORATION, VI/5A, NH-47, PARUR JUNCTION, PUNNAPRA NORTH P.O.,, ALAPPUZHA DISTRICT, REPRESENTED BY ITS BRANCH, MANAGER, TALMY N.J, S/O.JOSEPH, NARIKAVALLI, HOUSE, MALIPURAM, ERNAKULAM DISTRICT.

BY ADVS.
SRI.LAL K.JOSEPH
SRI.P.MURALEEDHARAN THURAVOOR
SRI.V.S.SHIRAZ BAVA

RESPONDENT/S:

1 STATE OF KERALA, REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

2 VINOD BHASKAR,

BY ADVS.
PUBLIC PROSECUTOR
SRI.P.KRISHNA KUMAR ALAPPUZHA
SRI.SUNIL J.CHAKKALACKAL

OTHER PRESENT:

SR PP SMT PUSHPALATHA M K

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 17.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

ORDER

Is the directions in ***Narayanan. A.C v. State of Maharashtra and others***[1] , followed by this Court in ***Shibu. L.P v. Neelakantan***[2] , strictly applicable in a complaint filed under Section 138 of the Negotiable Instruments Act by a power of attorney of a company/firm in view of the subsequent decision in ***TRL Krosaki Refractories Ltd (M/s). v. SMS Asia Private Limited and others***[3] is the question posed for consideration.

2. The appeal is filed questioning the correctness of the judgment in C.C.No.507/2008 passed by the Court of the Chief Judicial Magistrate, Alappuzha, holding the 2nd respondent not guilty of the offence

1 [2013 (3) KHC885]

2[2022 KHC 548]

3[2022 (2) KHC 157]

under Section 138 of the Negotiable Instruments Act (‘Act’ for short). The appellant was the complainant, and the 2nd respondent was the accused before the learned Magistrate.

Relevant facts

3. The complainant firm had filed the complaint against the accused, alleging that he had issued two cheques in its favour for Rs.1,60,000/- and Rs.20,000/- respectively, in discharge of a legally enforceable liability. However, the cheques were dishonoured due to 'insufficiency of funds' in the accused's bank account. Although the complainant issued a statutory notice demanding the above amounts, the accused failed to pay the same. Hence, the accused committed the offence.

4. The learned Magistrate took cognizance of the offence. The accused pleaded not guilty to the accusation. In the trial, the complainant examined its Branch Manager and Accountant (PWs 1 and 2) and marked in evidence Exts.P1 to P12 documents. The accused denied the incriminating questions in the examination under Section 313 of the Code of Criminal Procedure ('Code', for brevity). The accused produced and marked in evidence Ext.D1 series receipts.

5. After analysing the materials on record, the learned Magistrate found the accused not guilty, predominantly on the finding that there is no averment in the complaint regarding the status of the complainant and, therefore, PW1 is not competent to file and prosecute the complaint.

6. Heard; Sri. Lal K.Joseph, the learned Counsel appearing for the appellant and Smt.Pushpalatha M.K.,

the learned Senior Public Prosecutor appearing for the 1st respondent – State.

7. Sri. Lal K.Joseph contended that the learned Magistrate has erroneously observed that there is no averment in the complaint regarding the status of the complainant. It is specifically stated in paragraph 1 of the complaint that the complainant is a firm. In addition to the assertion, Ext.P9 partnership deed and Ext.P12 acknowledgement of the registration of the firms were marked in evidence. It is also explicitly stated that the complainant firm is represented by its Branch Manager and Ext.P10 resolution authorises him in that behalf. Moreover, PW2, the Accountant of the firm – has positively testified that he is aware of the transaction between the complainant and the accused, and that Ext.P2 cheque was executed in his presence. Furthermore, a Division Bench of this Court in ***Basheer***

K. v. C.K.Usman Koya and another[4], has held that only the concatenation of the five ingredients which is sine qua non to attract the offence under Section 138 of the Act need be averred in the complaint. Hence, he urged that the appeal be allowed, and the impugned judgment be set aside.

8. The learned Public Prosecutor drew my attention to a recent decision of this Court in ***Shibu.L.P v. Neelakantan***[2], wherein this court, relying on the three-judge Bench decision in ***Narayanan.A.C v. State of Maharashtra***[1], has held that there should be a specific assertion in the complaint that the power of attorney holder has the knowledge of the cheque, otherwise the power of attorney holder cannot be examined as a witness. She submitted that the impugned judgment aligns with the law laid down in ***Narayanan.A.C***[1] and ***Shibu.L.P***[2].

4[2021 (2) KHC 432]

9. Sri.Lal K.Joseph countered the above submission and relied on a subsequent three-judge Bench decision of the Honourable Supreme Court in ***TRL Krosaki Refractories Ltd (M/s). v. M/s.SMS Asia Private Limited and Ors.***[3], wherein the decision in *N**arayanan.A.C***[1] has been distinguished in so far as complaints filed by the company/firms are concerned. Hence, the learned Counsel argued that the decisions in ***Narayanan.A.C***[1] and ***Shibu.L.P***[2] are applicable only to complaints filed by individual complainants and not to complaints filed by companies/firms.

10. Is there any error in the impugned judgment?

11. The complainant is “M/s.Popular Motor Corporation”. A scrutiny of the complaint reveals that it is clearly stated that the complainant is a firm represented by its Branch Manager, who is competent to represent the complainant.

12. To corroborate the above statement, the complainant has marked Ext.P9 deed of partnership

and Ext.P12 acknowledgement of registration of firms in evidence.

13. In ***M/s.Shankar Finance & Investments v. State of Andhra Pradesh and others***[5], the Honourable Supreme Court held as under:

> *"7. The payee of the cheque is M/s. Shankar Finance & Investments. The complaint is filed by M/s. Shankar Finance & Investments, a proprietary concern of Sri. Atmakuri Sankara Rao, represented by its Power of Attorney Holder Sri. Thamada Satyanarayana'. It is therefore evident that the complaint is in the name of and on behalf of the payee. S. 142(a) of the Act requires that no Court shall take cognizance of any offence punishable under S.138 except upon a complaint made in writing by the payee.* ***Thus the two requirements are that (a) the complaint should be made in writing (in contradistinction from an oral complaint); and (b) the complainant should be the payee (or the holder in due course, where the payee has endorsed the cheque in favour of someone else). The payee, as noticed above, is M/s. Shankar Finance & Investments. Once the complaint is in the name of the 'payee and is in writing, the requirements of S.142 are fulfilled. Who should represent the where the payee is a company, or how the payee should be represented where payee is a sole proprietary concern, is not a matter that is governed by S.142, but by the general law.***
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> ***8. As contrasted from a company incorporated under the Companies Act, 1956 which is a legal entity distinct from its share holders, a proprietary concern is not a legal entity distinct from its proprietor. A proprietary concern is nothing but an individual trading under a trade name.*** *In civil law where an individual carries on business in a name or style other than*

5[2008 (4) KHC 352]

> *his own name, he cannot sue in the trading name but must sue in his own name, though others can sue him in the trading name. Therefore, if the appellant in this case had to file a civil suit, the proper description of plaintiff should be 'Atmakuri Sankara Rao carrying on business under the name and style of M/s Shankar Finance & Investments, a sole proprietary concern'.* ***But we are not dealing with a civil suit. We are dealing with a criminal complaint to which the special requirements of S.142 of the Act apply. S.142 requires that the complainant should be payee. The payee is M/s Shankar Finance & Investments. Therefore in a criminal complaint relating to an offence under S. 138 of the Act, it is permissible to lodge the complaint in the name of the proprietary concern itself".***
>
> *(emphasis supplied)*

14. In the case on hand, admittedly, the complainant is a firm. The complaint is filed by the firm in its name and is represented by its Branch Manager, who has been authorised as per Ext.P10 resolution. There is also a specific assertion in the complaint that PW1 is competent to represent the firm.

15. In the above framework, this Court is of the view that the finding of the learned Magistrate that PW1 is incompetent to file the complaint is erroneous and unsustainable in law.

16. Now, coming to the following questions:

(i) whether the power of attorney holder can depose on behalf of the complainant? and

(ii) whether there should be a specific assertion in the complaint that the power of attorney holder has knowledge about the transaction.

17. The above questions have been succinctly answered by the Honourable Supreme Court in ***TRL Krosaki Refractories Ltd.***[3], by distinguishing ***Narayanan.A.C***[1] and after referring to ***National Small Industries Corporation Ltd. v. State (NCT of Delhi) and others***[6], in the following lines:

> *"16. Further, in National Small Industries Corporation Ltd. v. State (NCT of Delhi) and Ors: (2009) 1 SCC 407, this Court, though was essentially considering the issue relating to the exemption available against examining a public servant keeping in view the scope Under Section 200(a) of Code of Criminal Procedure, has exhaustively considered the validity of a complaint Under Section 138 of N.I. Act and the satisfaction of the requirement Under Section 142 thereof. In the said context this Court has held as hereunder:*

6[2008 KHC 6997]

14. The term "complainant" is not defined under the Code. Section 142 of the NI Act requires a complaint Under Section 138 of that Act to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable Under Section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses. The requirement of Section 142 of the NI Act that the payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company, if a company is the complainant. A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney.

16. 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 an 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 a complainant-de jure, and a complainant-de facto. Clause (a) of the proviso to Section 200 provides that where the complainant is a public servant, it will not

be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the de facto complainant and in signing and presenting the complaint, he act in the discharge of his official duties. Therefore, it follows that in such cases, the exemption under Clause (a) of the first proviso to Section 200 of the Code will be available.

19. Resultantly, when in a complaint in regard to dishonour of a cheque issued in favor 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. And if the de facto complainant is a public servant, the benefit of exemption under Clause (a) of the proviso to Section 200 of the Code will be available, even though the complaint is made in the name of a company or corporation.

17. In that view, the position that would emerge is that when a company is the payee of the cheque based on which a complaint is filed Under Section 138 of N.I. Act, the complainant necessarily should be the Company which would be represented by and employee who is authorized. 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 authorized 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 A.C. Narayanan (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 therefor and that the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorized employee can represent the company. Such averment and prima facie material is sufficient for the learned Magistrate to take cognizance and issue process. *If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorized 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. As noted in Samrat Shipping Co. Pvt. Ltd. (supra), dismissal of a complaint at the threshold by the Magistrate on the question of authorisation, would not be justified. Similarly, we are of the view that in such circumstances entertaining a petition Under Section 482 to quash the order taking cognizance by the Magistrate would be unjustified, when the issue of proper authorisation and knowledge can only be an issue for trial".*

(Underlining and emphasis added)

18. Thus, a subtle distinction has been carved out in ***TRL Krosaki Refractories Ltd.***[3] by clarifying that in a complaint filed by a company/firm, a specific assertion regarding the knowledge of the power of attorney holder as laid down in ***Narayanan.A.C***[1] cannot be understood to mean that the assertion should be in the same particular manner, much less only in the manner understood by the accused. In cases where the complainant/payee is a company, an authorised employee can represent the

company. Therefore, the ratio decidendi in ***Narayanan.A.C***[1] broadly applies to complaints filed by individual complainants and not companies/firms.

19. In ***Basheer K. V. C.K.Usman Koya and another***[4], this Court has held that no particular form is prescribed under the Act concerning a notice under Section 138(b) of the Act, except that the payee or holder in due course should make a demand for the payment of the amount of money within 30 days from the receipt of intimation from the bank regarding the return of the cheque and the Court cannot legislate by prescribing a particular form and cannot require that the nature of the transaction leading to the issuance of cheque be disclosed in the notice when the statute does not provide for it. It is also observed that a complaint filed under Section 138 of the Act should contain the factual allegations about the five ingredients, namely, (i) the cheque drawn in a valid account by the holder, (ii) its presentation within six

months or validity period; whichever is earlier, (iii) dishonour, (iv) demand by the payee or holder in due course, (v) which demand is within 30 days of dishonour.

20. In the present case, at the risk of repetition, it is reiterated that the complainant had instituted the complaint through PW1, who is authorised to file the complaint. In the trial, the complainant examined PWs1 and 2 and marked Exts.P1 to P12. PW2, in clear terms, testified that he is aware of the transactions between the complainant firm and the accused. In addition to Exts.P1 and P2 cheques, the complainant also produced Ext.P11 statement of accounts, which shows that the outstanding amount due from the accused to the complainant tallies with the amounts covered by Exts.P1 and P2 cheques, i.e., Rs.1,80,000/-. Therefore, the complainant has discharged its initial onus of proof by satisfying the concomitants constituting the

ingredients under Section 138 of the Act and has shifted the reverse onus of proof onto the shoulders of the accused.

21. Admittedly, the accused had not sent a reply notice. Instead, the accused has marked Ext.D1 receipts in evidence to substantiate his payments to the complainant. Ext.D1 receipts corroborate the testimonies of PWs.1 and 2 and Ext.P11 statement that the accused had business transactions with the complainant.

22. In ***Rangappa vs. Sri.Mohan***[7], A three-judge Bench of the Hon'ble Supreme Court, while dealing with Sec.139 of the 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*

7[2010 KHC 4325]

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".*

23. Subsequently, in ***Kalamani Tex and Anr vs. P.Balasubramanian***[8] another three-judge Bench of the Hon'ble Supreme Court has reiterated the doctrine of the reverse onus 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, obligation shifts upon the accused to discharge the presumption imposed upon him.*** *This point of law has been crystalized by this Court in Ro*hitbhai Jivanlal Patel v. State of Gujarat (2019 (2) KHC 243)."

24. On a comprehensive re-appreciation of the materials placed on record, particularly the oral testimonies of PWs 1 and 2 and Exts.P1 to P12, this Court finds that the accused has failed to discharge the reverse onus of proof under Section 139 of the Act and, therefore, the finding of the learned Magistrate is erroneous. Consequently, the accused is liable to be

8[2021 (2) KHC 571]

convicted for the offence under Section 138 of the Act.

25. In ***Damodar S. Prabhu v. Sayed Babalal H***[9]**,** the Honourable Supreme Court has held that, unlike other forms of crime, the punishment under Section 138 of the Act is not a means of seeking retribution but a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the accused being incarcerated. While passing an order of sentence for the offence under Section 138, the courts must keep the compensatory aspect in mind rather than giving priority over the punitive part.

26. Considering the above principles, this Court deems it justifiable to sentence the accused to undergo imprisonment for one day and pay compensation to the complainant with a default sentence.

27. In the result;

(i) The appeal is allowed;

9[2010 (2) KHC 428]

(ii) The impugned order is set aside;

(iii) The 2nd respondent/accused in C.C.No.507/2008 of the court below is found guilty and convicted for the offence under Section 138 of the Act;

(iv) The accused is sentenced to undergo imprisonment for one day (till the rising of the court) and pay a compensation of Rs.2,00,000/- to the complainant within two months from today.

(v) The 2nd respondent/accused is directed to appear before the Trial Court on 17.12.2023 to undergo the sentence and pay the compensation amount.

(vi) If the 2nd respondent fails to appear before the Trial Court, the learned Magistrate shall execute the sentence and recover the compensation amount from the 2nd respondent in accordance with law.

(vii) If the compensation amount is recovered, the same shall be paid to the appellant/complainant under

Section 357(3) of the Code and in accordance with law.

(viii) The execution of the sentence shall stand deferred till 17.12.2023.

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

Sd/-C.S.DIAS
JUDGE

rkc/17.10.23