



2023/KER/82236

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
WEDNESDAY, THE 6TH DAY OF DECEMBER 2023 / 15TH AGRAHAYANA,
1945

CRL.REV.PET NO. 1799 OF 2013

AGAINST THE JUDGMENT DATED 13.12.2010 IN ST 2211/2006 OF
JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, KOTTAYAM
CRL.APPEAL NO.558/2010 OF ADDITIONAL SESSIONS COURT,
KOTTAYAM

REVISION PETITIONER/APPELLANT/ACCUSED:

MATHEW KUNJU MATHEW, AGED 54 YEARS,

BY ADVS.
SRI.ADITHYA RAJEEV
SHRI.SREEDEV U

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 K.V.KURIAKOSE, AGED 67 YEARS,

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

BY ADVS.
SRI.ELVIN PETER P.J.
SRI.K.R.GANESH
SRI.T.G.SUNIL PRANAVAM

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 06.12.2023, ALONG WITH Crl.Rev.Pet.1962/2013 AND
CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
WEDNESDAY, THE 6TH DAY OF DECEMBER 2023 / 15TH AGRAHAYANA,
1945

CRL.REV.PET NO. 1816 OF 2013

AGAINST THE JUDGMENT DATED 13.12.2010 IN ST 2214/2006 OF
JUDICIAL FIRST CLASS MAGISTRATE COURT-IV, KOTTAYAM
CRL.APPEAL NO.559/2010 OF ADDITIONAL SESSIONS COURT,
KOTTAYAM

REVISION PETITIONER/APPELLANT/ACCUSED:

MATHEW KUNJU MATHEW, AGED 54 YEARS,

BY ADVS.
SRI.ADITHYA RAJEEV
SHRI.SREEDEV U

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 K.V.KURIAKOSE, AGED 67 YEARS,

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

BY ADVS.
SRI.ELVIN PETER P.J.
SRI.K.R.GANESH
SRI.T.G.SUNIL PRANAVAM

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 06.12.2023, ALONG WITH Crl.Rev.Pet.1962/2013 AND
CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
WEDNESDAY, THE 6TH DAY OF DECEMBER 2023 / 15TH AGRAHAYANA,
1945

CRL.REV.PET NO. 1962 OF 2013

AGAINST THE JUDGMENT DATED 13.12.2010 IN ST 2206/2006 OF
JUDICIAL FIRST CLASS MAGISTRATE-IV, KOTTAYAM
CRL.APPEAL NO.557/2010 OF ADDITIONAL SESSIONS COURT,
KOTTAYAM

REVISION PETITIONER/APPELLANT/ACCUSED:

MATHEW KUNJU MATHEW, AGED 54 YEARS,

BY ADVS.
SRI.ADITHYA RAJEEV
SHRI.SREEDEV U

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1 K.V.KURIAKOSE, AGED 67 YEARS,

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

BY ADVS.
SRI.ELVIN PETER P.J.
SRI.K.R.GANESH
SRI.T.G.SUNIL PRANAVAM

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 06.12.2023, ALONG WITH CrI.Rev.Pet.Nos.1799/2013,
1816/2013, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



“CR”

ORDER

These revisions are at the instance of the accused in S.T.No.2211 of 2006, S.T.No.2214 of 2006 and S.T.No.2206 of 2006 on the file of Judicial First Class Magistrate Court No.IV, Kottayam, assailing the common judgment in Crl.Appeal Nos.558 of 2010, 559 of 2010 and 557 of 2010 on the file of Additional Sessions Court, Kottayam, which upheld his conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred as ‘the NI Act’), though modified and reduced the sentence to certain extent.

2. S.T.No.2211 of 2006, S.T.No.2214 of 2006 and S.T.No.2206 of 2006 were filed by the 1st respondent/complainant against the revision petitioner alleging an offence punishable under Section 138 of the NI Act. The case of the 1st respondent/complainant was that the revision petitioner borrowed from him Rs.10,00,000/- each on three occasions i.e., on 20.03.2003, 16.04.2003 and



20.11.2003, for the working capital requirements of his contract works. Towards discharge of that debt, he issued Exts.P1 cheque dated 05.04.2006 for Rs.10,00,000/-, Exts.P4 cheque dated 12.04.2006 for Rs.10,00,000/- and Ext.P7 cheque dated 18.04.2006 for Rs.12,00,000/-, assuring that he would get the cash on presenting the cheques before the Bank. Though the 1st respondent/complainant presented the cheques before the Bank for encashment, the cheques were returned dishonoured for the reasons account was closed and insufficiency of funds. He sent statutory notice to the revision petitioner, intimating dishonour of the cheques and demanding the cheque amounts. But, he did not repay the amount, and hence he filed the above criminal complaints under Section 138 of the NI Act.

3. On appearance of the revision petitioner before the trial court, particulars of offence was read over and explained in all the three cases, to which he pleaded not



guilty and claimed to be tried. Since the parties were same and the transactions were interconnected, the trial court tried those three cases jointly. PWs 1 to 3 were examined and Exts.P1 to P26 were marked from the side of the 1st respondent/complainant. On closure of the evidence of the complainant, the revision petitioner/accused was questioned under Section 313 of Cr.P.C. He denied all the incriminating materials brought on record, and Exts.D1 to D4 were marked from his side.

4. On an anxious consideration of the facts and evidence and on hearing the rival contentions from either side, the trial court found the revision petitioner guilty under Section 138 of the NI Act in all the three cases, and he was convicted and sentenced to undergo simple imprisonment for one month in all the three cases and compensation of Rs.10,00,000/- in S.T.Nos.2206 of 2006 and 2211 of 2006, and Rs.12,00,000/- in S.T.No.2214 of 2006, to be paid to the complainant under Section 357(3) of Cr.P.C., with a



default sentence of simple imprisonment for a further period of two months, in each case.

5. Aggrieved by the conviction and sentence, in all the three cases, the revision petitioner preferred Crl.Appeal Nos.558 of 2010, 559 of 2010 and 557 of 2010. The appellate court, on re-appreciation of the facts and evidence, found no reason to interfere with the conviction of the revision petitioner under Section 138 of the NI Act, and hence his conviction was upheld. But the sentence was modified and reduced to imprisonment till rising of court without disturbing the compensation part, though the default sentence was modified and increased to simple imprisonment for three months in all the three cases. Impugning the common judgment of the appellate court, the revision petitioner preferred the above revision petitions.

6. Now this Court is called upon to verify the legality, propriety and correctness of the conviction and sentence of the revision petitioner under Section 138 of the NI Act



imposed by the appellate court, as per the impugned common judgment.

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

8. At the outset, learned counsel for the revision petitioner pointed out that the 1st respondent/complainant had filed O.S.No.174 of 2009 before the Additional Sub Court, Kottayam, for recovery of money based on Exts.P1, P4 and P7 cheques, and learned Additional Sub Judge, as per judgment dated 24.03.2012, dismissed the suit finding that no amounts were actually due to the plaintiff/complainant based on those cheques. He failed to prove before the civil court that the cheques were supported by consideration. So, learned counsel for the revision petitioner would argue that Exts.P1, P4 and P7 cheques are not supported by any consideration, and there was no legally enforceable debt for issuing those cheques, and so much so, an offence under Section 138 of the NI Act will not be



attracted.

9. Dismissal of O.S.No.174 of 2009 filed by the 1st respondent/complainant, for recovery of amounts based on Exts.P1, P4 and P7 cheques involved in the criminal proceedings initiated under Section 138 of the NI Act, is not disputed by him. It is also not disputed that the plaintiff/complainant did not prefer any appeal against the judgment in O.S.No.174 of 2009. So judgment in O.S.No.174 of 2009 has become final. That suit was filed in the year 2009 during pendency of the proceedings under Section 138 of the NI Act before the trial court. Pending civil suit, the revision petitioner was convicted under Section 138 of the NI Act, in S.T.No.2211 of 2006, S.T.No.2214 of 2006 and S.T.No.2206 of 2006, as per common judgment dated 13.12.2010. Certified copy of that common judgment was produced in the civil suit as Ext.A16.

10. Learned Additional Sub Judge, thoroughly examined the preponderance of probabilities and came to



the conclusion that those cheques were not supported by any consideration and the plaintiff/complainant was creating documents based on blank cheque leaves, blank stamp papers and other blank signed papers obtained from the revision petitioner, in previous business transactions with him. That finding was made even after taking into account the conviction of the revision petitioner under Section 138 of the NI Act, based on the very same cheques, on the basis of which O.S.No.174 of 2009 was filed.

11. Since the judgment of the Additional Sub Court, Kottayam, in O.S.No.174 of 2009 is not challenged by the plaintiff/complainant, this Court need not delve into the veracity of the reasonings given by learned Additional Sub Judge in that judgment. Learned Additional Sub Judge disbelieved the testimony of PWs 1 to 3 on cogent reasons, and the contradictions in their testimony were taken note of, to find the falsity of the case put forward by the plaintiff. Since that judgment was never appealed against, it has



become the final verdict on the issues involved, from a competent civil court. The cheques involved in the above criminal proceedings were found to be not supported by consideration, and on finding that no amounts were due to the 1st respondent/complainant based on those cheques, the suit was dismissed by the civil court.

12. The revision petitioner would argue that since there is a finding of the civil court, as to the fact in issue, which is relevant before the criminal proceedings also, the judgment of the civil court is binding on the criminal court, and hence the criminal proceedings could not be allowed to continue. He further submitted that the judgment of the civil court is relevant under Section 43 read with Section 11 of the Indian Evidence Act.

13. Let us have a look at Sections 43 and 11 of the Indian Evidence Act.

14. Section 43 of the Indian Evidence Act reads thus:

"43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant



Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue or is relevant under some other provisions of this Act.”

15. Section 11 of the Indian Evidence Act reads thus:

“11. When facts not otherwise relevant become relevant

(1) if they are inconsistent with any fact in issue or relevant fact.

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.”

16. Here the interesting question is whether a criminal court is bound by the decree and judgment passed by a competent civil court taking shelter under Sections 11 and 43 of the Indian Evidence Act.

17. In **Premshanker v I.G. of Police [2002 KHC 792 : 2002 (3) KLT 389 : AIR 2002 SC 3372]**, the Apex Court held that when there is institution of criminal case and civil case for same cause, judgment of the civil court



becomes relevant if conditions of any of Sections 40 to 43 of the Indian Evidence Act are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41 of the Indian Evidence Act.

18. Relying on **Premshanker's** case cited *supra*, this Court in **Mohandas v. P Abdul Azeez and Others [2011 (3) KHC 41 : 2011 (3) KLJ 142]** decided a case, with similar facts as of the case on hand. It was a cheque case under Section 138 of the NI Act, and a civil suit for recovery of money was also filed based on the very same cheque. The civil suit was dismissed finding that the cheque was not supported by consideration. The question considered was whether the decree of the civil court was binding on the criminal court. While answering that question, this Court held that, finding of the civil court, that the cheque is not supported by consideration, would be relevant, notwithstanding the fact, that the criminal court has passed an order of conviction against the accused.



19. Paragraphs 15 to 20 of **Mohandas'** case cited *supra* read thus:

"15. Thus a perusal of the above provisions contained in S.41 to 43 will give a clear perspective as to how judgments, orders or decrees passed by a competent Court would become relevant in another case. If the decree or judgment in question is inter partes and if the existence of the said judgment is not disputed by either of the two parties, the said judgment or decree becomes all the more relevant. It need not be stressed that the decree or judgment assumes greater relevance and significance if the decree or judgment sought to be relied on is in respect of the same subject matter.

16. In the case on hand admittedly the suit was in relation to the very same cheque (Ext. P1). It is beyond controversy that the Trial Court had passed the judgment in the case on April 26, 1995 holding the petitioner guilty of the offence. Nevertheless, the complainant chose to institute the suit before the Civil Court on August 4, 1995. Apparently at that time the appeal preferred by the petitioner was pending before the Sessions Court. The Civil Court dismissed the suit on December 5, 1997. The Sessions Court had disposed of the criminal appeal only on June 21, 2001. However it appears that the decree passed by the Civil Court was not brought to the notice of the Sessions Court. Anyhow the fact remains that the Sessions Court confirmed the order of conviction and sentence passed by the Trial Court.

17. As mentioned earlier, the short question that



falls for consideration is whether the fate of the criminal prosecution should hang on the decree and judgment passed by the Civil Court based on the very same cheque. It is trite that if the criminal case and the civil proceeding are for the same cause, judgment of the Civil Court would be relevant, if conditions stipulated in S.40 to 43 are satisfied. It has been so held by a three Judge Bench of the apex Court in Prem Sankar v. I.G. of Police, 2002 KHC 792 : 2002 (3) KLT 389 (SC) : ILR 2003 (1) Ker. 153 : AIR 2002 SC 3372 : 2002 (8) SCC 87 : 2002 CriLJ 4343 . However the Court further cautioned that '... the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under S.40 and S.42 or other provisions of the Evidence Act, then in each case, Court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein'. In other words, the Court laid down that the issue will depend upon facts of each case.

18. It is well settled that holder of a cheque is entitled to institute suit for recovery of the money covered under the said cheque, even if he has filed a complaint under S.138 of the Negotiable Instruments Act against the drawer of the cheque (State of Rajasthan v. K. Sundaram Cement Inds. (SC), 1996 KHC 458 : 1996 Com. Cases 433 : 1996 (2) KLT SN 11 : 1996 (3) SCC 87 : JT 1996 (3) SC 162 : 1996 (2) SCALE 403. Various High Courts have also repeatedly held that enforcement of the liability through a Civil Court will not disentitle the aggrieved person from prosecuting the offender for the offence punishable under S.138 of the Act. Both remedies may be simultaneously available and a civil suit cannot



deter the criminal cause of action.

19. It has also been held in several cases that successful termination of the civil litigation can not ipso facto mean that the criminal prosecution cannot be pursued. The only safeguard the drawer of the cheque (accused) may have is that realisation of the amount by the Civil Court will definitely have a bearing on the Criminal Court while considering the sentence to be imposed on him if he is found guilty. Even while executing the decree passed by the Civil Court the payment, if any, made by the accused before the Criminal Court will have to be given credit to.

20. The above being the settled position about the right of the holder of a cheque to proceed against the drawer simultaneously before the Civil Court and Criminal Court, the other question as to what would be the impact (*sic*) of the finding of the Civil Court in criminal proceedings or whether the cheque was a valid negotiable instrument supported by consideration or whether or not there existed a legally enforceable debt or liability etc. has to be answered in the backdrop of the above settled legal position. In my view, for the reasons stated above, question posed for consideration has to be answered in the affirmative. I do so. Therefore, the order of conviction and sentence passed against the petitioner is set aside."

20. In the case on hand, a competent civil court found that the cheques in question which were the subject matter of the criminal proceedings under Section 138 of the NI Act



were not supported by valid consideration. That judgment was delivered even after taking into account the conviction of the revision petitioner under Section 138 of the NI Act and the judgment of the civil court has become final also. Since those cheques were found to be not supported by valid consideration, the essential ingredient of Section 138 of the NI Act, that the cheque should have been issued towards a legally enforceable debt, is given a go by, and so the judgment of the civil court becomes relevant under Section 43 of the Indian Evidence Act and hence the conviction and the sentence passed by the courts below cannot sustain in the eye of law.

21. The presumption under Sections 118 and 139 of the NI Act is of no avail, when the cheques are proved to be not issued towards discharge of any legally enforceable debt.

22. In the result, the revision petitions are allowed, setting aside the concurrent findings of the trial court as well as the appellate court convicting and sentencing the revision



petitioner under Section 138 of the NI Act. The revision petitioner is found not guilty of the offence punishable under Section 138 of the NI Act and he is acquitted in all the cases referred in the revisions. His bail bonds are cancelled and he is set at liberty forthwith.

The judgment and decree in O.S.No.174 of 2009 on the file of Additional Sub Judge, Kottayam, produced by learned counsel for the revision petitioner shall form part of the records.

Sd/-

SOPHY THOMAS, JUDGE

DSV/-