

S.138 NI Act | Director Cannot Be Prosecuted For Cheque Dishonour Without Arraying Company As Accused: Kerala High Court Reiterates

2022 LiveLaw(Ker) 561

IN THE HIGH COURT OF KERALA AT ERNAKULAM

A. BADHARUDEEN; J.

Crl.R.P.No.622 of 2022 19th October 2022

KALLAR HARIKUMAR versus AMRITHA ENTERPRISES PVT.LTD.

Against the Judgment in CC 41/2013 of Judicial Magistrate of First Class - V, (Special Court - Marklist Cases), Thiruvananthapuram Crl. Appeal No. 53/2016 of Additional Sessions Court - V, Thiruvananthapuram

Revision Petitioners / Appellants / Accused: by Adv Noble Mathew

Respondents / Respondents / Complainant & State: by Advs. K Manoj Chandran Public Prosecutor P.R. Ajith kumar, Ammu Charles, S.A. Mansoor (Pattanam), by Renjit George, Sr. Public Prosecutor

ORDER

Accused Nos.1 and 2 in C.C.No.41 of 2013 on the file of the Judicial First Class Magistrate Court-V, Thiruvananthapuram are the revision petitioners in this revision petition filed under Sections 397 and 401 of Code of Criminal Procedure (hereinafter will be referred as Cr.P.C. for convenience). The respondents herein are the original complainant as well as the State of Kerala.

2. Heard the learned counsel for the revision petitioners as well as the learned counsel appearing for the first respondent and the learned Public Prosecutor for the second respondent/State of Kerala.

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

4. The revision petitioners assailed judgment dated 30.11.2015 in CC 41/2013 of the learned Magistrate and confirmed in appeal by the Additional Sessions Judge-V, Thiruvananthapuram as per judgment dated 11.10.2018 in Crl.Appeal No.53 of 2016.

5. The learned counsel for the revision petitioners, while assailing the concurrent verdicts of the trial court raised an important legal question, and the same will go to the root of the matter, if found, in favour of the revision petitioners. In this matter, the complainant launched prosecution alleging commission of offence punishable Under Section 138 of Negotiable Instruments Act (hereinafter will be referred as 'N.I Act' for convenience), on dishonour of a cheque for Rs.5,26,500/-, alleged to be issued with signatures of the revision petitioners, as directors, for and on behalf of the Teltron Kuri Company Pvt.Ltd.

6. The courts below concurrently found commission of offence punishable under Section 138 of the Negotiable Instruments Act by the revision petitioners.

7. The legal question that has been pressed into before this Court is, whether a prosecution launched under Section 142 of the NI Act would lie against the Director/Directors of a company without arraying the company as an accused?

8. In this connection, the learned counsel for the revision petitioner placed a decision of the Apex Court reported in [(2019) 3 SCC 797], **Himanshu v. B.Shivamurthy and another**, where the Apex Court considered exactly similar question in paragraph Nos.11, 12, 13 and 14 of the judgment and held that in the absence of company being arraigned as an accused, a complaint against the director

is not maintainable, merely for the reason that the Director of the Company had signed the cheque for and on behalf of the company. It was held further that the commission of the offence by the company is an express condition precedent to attract vicarious liability of Director. Therefore, the ratio of the decision, indubitably, is that, in a prosecution alleging commission of the offence punishable Under Section 138 of N.I Act, when cheque being issued by a company, a prosecution shall not sustain without arraying the company as an accused. No doubt, then its director/directors can be arrayed as co-accused, being signatory/signatories of the cheque.

9. In this case, admittedly, the cheque was issued for and on behalf of a company and the company is not arraigned as an accused. Therefore, in view of the above legal position, the entire prosecution is vitiated and accordingly, the concurrent finding of conviction and sentence are liable to be set aside.

10. Accordingly, the revision petition stands allowed and conviction and sentence impugned stand set aside.

11. At this juncture, it is argued by the learned counsel for the first respondent that in **Himanshu's** case (supra), the Apex Court, while recording acquittal, directed the Registry to issue communication to the respondent/complainant in the said case to give the amount of money deposited before the court, as directed. Therefore, the amount, if any, deposited in this case, may be directed to be given to the complainant.

12. In response to this submission, the learned counsel for the revision petitioners would submit that there is a civil suit and decree has been passed therein.

Therefore, it is ordered that the amount, if any, deposited in this case before the court below shall be released to the first respondent and the amount shall be adjusted towards the decree debt and the first respondent is entitled to realise the remaining amount alone by executing the decree or otherwise, subject to the terms of the decree.

© All Rights Reserved @LiveLaw Media Pvt. Ltd.

*Disclaimer: Always check with the original copy of judgment from the Court website. Access it [here](#)