

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

TUESDAY, THE 14TH DAY OF NOVEMBER 2023 / 23RD KARTHIKA, 1945

CRL.REV.PET NO. 1060 OF 2008

AGAINST THE JUDGMENT IN CC 695/2000 OF JUDICIAL MAGISTRATE OF

FIRST CLASS-I, KANJIRAPPALLY

AGAINST THE JUDGMENT IN CRA 226/2005 OF ADDITIONAL SESSIONS COURT

(ADHOC-I), KOTTAYAM

REVISION PETITIONER/2ND APPELLANT/2ND ACCUSED:

AFSAL HUSSAIN.
AGED 37 YEARS,

BY ADV SRI.C.P.PEETHAMBARAN

RESPONDENT/RESPONDENT/COMPLAINANT AND STATE:

1 K.S.MUHAMMED ISMAIL

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

BY ADV PUBLIC PROSECUTOR

OTHER PRESENT:

SR,P.P.- SRI RENJITH GEORGE

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR FINAL HEARING ON 14.11.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

(C.R.)

ORDER

This revision is at the instance of the 2nd accused in C.C. No.695 of 2000 on the file of Judicial First Class Magistrate Court-I, Kanjirappally, assailing the judgment in Crl.Appeal No.226 of 2005 on the file of Additional Sessions Judge, (Adhoc-1), Kottayam, which upheld his conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred as 'the N.I Act'), and modified the sentence and reduced it into imprisonment till rising of the court and fine of Rs.10 lakh with a default sentence of simple imprisonment for three months with a direction that, if the fine amount is paid, it shall be given to the complainant/1st respondent as compensation under Section 357(1) of Cr.P.C.

2. C.C. No. 695 of 2000 was based on a complaint filed by the 1st respondent herein, with regard to dishonour of Ext.P2 cheque dated 20.02.2000 issued by the revision petitioner as the Managing Director of Omnitech Information Systems Pvt. Ltd towards

discharge of Rs.10 lakh due to the 1st respondent/
complainant, from the 1st accused-company.

3. In the complaint, the company was the
1st accused, its Managing Director was the 2nd accused,
and other Directors were accused Nos. 3 to 5.

4. On appearance of accused persons before the
Magistrate court, particulars of offence was read over and
explained, to which they pleaded not guilty and claimed
to be tried. Thereupon, the complainant examined
PWs.1 to 4, and marked Exts.P1 to P18 to prove his case.

5. On closure of complainant's evidence, the
accused persons were questioned under Section 313 of
Cr.P.C. and they denied, all the incriminating
circumstances brought on record. No defence evidence
was adduced.

6. On hearing the rival contentions from either
side and on analysing the facts and evidence, the trial
court found all the accused guilty under Section 138 of
the N.I Act, and 1st accused-company was sentenced to
pay fine of Rs. 5,000/- and accused Nos.2 to 5 were

sentenced to undergo simple imprisonment for six months and compensation of Rs.2,50,000/- by each, and in default of payment of compensation, they were directed to undergo simple imprisonment for a further period of three months each.

7. Aggrieved by the conviction and sentence, accused Nos.1 to 3 preferred Crl. Appeal No.226 of 2005 and accused No.5 preferred Crl. Appeal No.230 of 2005. Both appeals were heard together by the appellate court, and Crl. Appeal No.226 of 2005 was allowed in part, by acquitting accused Nos. 1 and 3 and upholding the conviction of 2nd accused/revision petitioner under Section 138 of the N.I Act and modifying and reducing the substantive sentence into imprisonment till rising of the court and compensation of Rs.10 lakh. The appeal filed by the 5th accused as Crl. Appeal No.230 of 2005 was also allowed, setting aside his conviction and sentence under Section 138 of the N.I Act. So, in effect only the conviction of the revision petitioner/2nd accused was upheld by the appellate court, though his substantive sentence was

modified and reduced, and the compensation amount was enhanced to Rs.10 lakh, against which, he has come up with this revision.

8. Now this Court is called upon to verify the legality, propriety and correctness of the impugned judgment in Crl. Appeal No.226 of 2005, which upheld the conviction of the revision petitioner under Section 138 of the N.I Act and a modified sentence was imposed.

9. Though service is complete, none appears for the 1st respondent/complainant.

10. Heard learned counsel for the revision petitioner and learned Public Prosecutor.

11. Learned counsel for the revision petitioner is impugning the judgment, mainly on the ground that, when the company in which he was the Managing Director was acquitted of the offence under Section 138 of the N.I Act, he being its Managing Director, has no vicarious liability for the offence committed by the company. The case of the 1st respondent/complainant also was that, the revision petitioner issued Ext.P2

cheque in his capacity as the Managing Director of Omnitech Information Systems Pvt. Ltd. So, when the company is acquitted of the charges levelled against it, according to the revision petitioner, the Managing Director cannot have any liability for and on behalf of the company.

12. In the complaint filed by the complainant/ 1st respondent, his case was that, accused Nos.2 and 3 to 5, who were the Managing Director and Directors respectively of the 1st accused-company, requested him to invest some amount in the 1st accused-company, and accordingly, he deposited Rs.10 lakh with the company. But later, they failed to return the amount as agreed. When he demanded that amount, the 2nd accused issued Ext.P2 cheque dated 20.02.2000 drawn on State Bank of India, Mattanchery branch. According to him, that cheque was issued towards discharge of the amount due to him, from the 1st accused-company. He presented the cheque for collection, but it was dishonoured, for the reason “funds insufficient” and “property not marked”. He sent

notice to the accused persons, as envisaged under Section 138(b) of the N.I Act. The notice was accepted by the revision petitioner (A2), and accused Nos.3 and 5. Notice to the 1st accused-company returned with the endorsement 'addressee left'. Notice to the 4th accused was also returned 'unserved'. In spite of receipt of notice by the revision petitioner, no reply was sent, and the amount was not repaid. So the 1st respondent/complainant filed the complaint under Section 138 of the N.I Act against the company and its Directors. Though the trial court found all the accused guilty under Section 138 of the N.I Act and convicted and sentenced them, the appellate court acquitted all the accused except the revision petitioner (A2).

13. Let us see who are all responsible, when an offence under Section 138 of the N.I Act is committed by a company.

14. Section 141 of the N.I Act reads thus;“

141. Offences by companies:-

(1) If the person committing an offence under

section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

PROVIDED that nothing contained in this subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: ”

15. Learned Counsel for the revision petitioner relied on the decision *Aneeta Hada V. Godfather Travels and Tours Private Ltd* [(2012) 5 SCC 661] to say that, when the company can be prosecuted, then only the persons mentioned in the other categories under Section 141 of the N.I Act could be vicariously liable for the offence.

16. Paragraph 58 of the decision *Aneeta Hada [(2012) 5 SCC 661]* reads thus;

“ 58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an

express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

17. In ***Siby Thomas v. Somany Ceramics Ltd*** [2023 (5) KLT 844 (SC)] the Apex Court held that, vicarious liability would be attracted only when the ingredients of Section 141(1) of the N.I Act are established.

18. Paragraph 16 of the decision ***Siby Thomas (2023 (5) KLT 844 SC)*** reads thus;

" 16. Thus, in the light of the dictum laid down in Ashok Shewakramani's case (supra) it is evident that a vicarious liability would be attracted only when the ingredients of S 141(1) of the NI Act, are satisfied. It would also reveal that merely

because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company. A bare perusal of S. 141(1) of the NI Act, would reveal that only that person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. In such circumstances, paragraph 20 in Ashok Shewakramani's case (supra) is also relevant. After referring to the S.141(1) of NI Act, in paragraph 20 it was further held thus:

“20. On a plain reading, it is apparent that the words “was in charge of” and “was responsible to the company for the conduct of the business of the company” cannot be read disjunctively and the same ought to be read conjunctively in view of use of the word “and” in between.”

19. In ***Pramod v. Velayudhan*** (2005 (4) KLT SN 96 Case No.128) this Court held that, *to hold a person guilty of offence under Section 138 of the N.I Act by virtue of Section 141 of the N.I Act, the first and foremost requirement to be established is commission of the offence by another person i.e. a company, firm or*

association of individuals. Unless and until, it is established that such juristic person commits offence under Section 138 of the N.I Act, no person referred to in Section 141 of the N.I Act can be proceeded against, summoned, prosecuted or convicted for offence under Section 138 of the N.I Act. In other words, commission of offence under Section 138 of the N.I Act by a juristic person is an inevitable legal pre-requisite or the condition precedent to proceed against a person referred to under Section 141 of the N.I Act and to hold him guilty of the said offence. It is thus clear that a person referred to in Section 141 of the N.I Act can be prosecuted and convicted for an offence committed by another person.

20. In the case on hand, the 1st accused-company owed amount to the complainant/1st respondent. Admittedly the revision petitioner was the Managing Director of that company and he issued that cheque in his capacity as its Managing Director. When the company is found not guilty of the offence alleged, the Managing Director cannot be held vicariously liable for the offence

committed by the company. No appeal or revision has been preferred by the complainant/1st respondent against the acquittal of the 1st accused-company. So, that verdict has become final. So much so, the revision petitioner Managing Director cannot be held liable as the company was acquitted, finding that no offence was committed by the company. The revision petitioner in his personal capacity did not owe any amount to the complainant/1st respondent and Ext.P2 cheque was issued not towards discharge of any personal liability of the revision petitioner. He issued that cheque, in his capacity as the Managing Director of the company. Since the company is acquitted, its Managing Director, cannot have any liability, de hors the liability of the company. The liability of persons referred to in Section 141 of the N.I Act is co-extensive with that of the company, firm or association of individuals, in a prosecution under Section 138 of the N.I Act. When it is found that the company has not committed the offence, and it is acquitted, its directors are not liable to be convicted, for the offence for which

the company has been acquitted.

21. In the result, the finding of the appellate court that, the revision petitioner/2nd accused has committed an offence punishable under Section 138 of the N.I Act in spite of acquittal of the 1st accused-company, is liable to be set aside.

22. In the result, the impugned judgment is set aside and the revision petitioner is found not guilty of the offence punishable under Section 138 of the N.I Act and he is acquitted. His bail bond is cancelled and he is set at liberty forthwith.

The revision petition stands allowed accordingly.

Sd/-

SOPHY THOMAS

JUDGE

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