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**(2010) 05 KL CK 0075**

**High Court Of Kerala**

**Case No:** Criminal Rev. Petition No. 1474 of 2001 (A)

Mahendran Asari

APPELLANT

Vs

R. Anil Kumar

RESPONDENT

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**Date of Decision:** May 24, 2010

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 357(3), 446
- Negotiable Instruments Act, 1881 (NI) - Section 138

**Hon'ble Judges:** R. Basant, J

**Bench:** Single Bench

**Advocate:** Gopakumar R. Thaliyal, for the Appellant; V.R. Gopu, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

R. Basant, J.

This revision petition is directed against a concurrent verdict of guilty and conviction u/s 138 of the Negotiable Instruments Act. The sentence imposed by the trial court was modified and reduced by the appellate court.

2. The cheque is for an amount of Rs. 17,000/-. According to the complainant, the accused had borrowed an amount of Rs. 17,000/- and had issued Ext.P1 cheque for Rs. 17,000/-. The direction in the cheque was to pay the amount by cash. The same was presented. It was dishonoured on the ground of insufficiency of fund. Notice of demand was issued. The same was duly acknowledged. There was no reply sent to the notice of demand. The complainant scrupulously followed the statutory time table. The amount was not paid. The complainant came to court with the complaint.

3. Cognizance was taken by the learned Magistrate. The accused entered appearance. He denied the offence. The complainant examined himself as P.W.1. The Managers of the collecting bank and the drawee bank were examined as P.Ws.2 and 3. On the side of the accused, he himself examined as D.W.1. P.W.3 was called back and examined again

as D.W.2. Exts.P1 to P11 were marked on the side of the complainant and Exts.D1 and D2 were marked on the side of the accused. The accused admitted that he had signed the cheque and had handed over the same to the complainant. But, according to him, it was not intended to be encashed by the complainant. It was handed over to the complainant so that he could hand over the same to an establishment by name "Pala Timbers". It was not so handed over as later it did not become necessary to hand over the cheque. But the complainant retained the cheque with him and misused the same by presentation for encashment.

4. The courts below considered the question of complicity. They came to the conclusion that the complainant had succeeded in proving all the ingredients of the offence punishable u/s 138 of the N.I. Act. The courts found that the cheque was issued by the accused to the complainant for the due discharge of a legally enforceable debt/liability. Accordingly, the courts below proceeded to pass the impugned verdict of guilty, conviction and sentence. The appellate court had modified the sentence of fine. The same was reduced from Rs. 17,000/- to Rs. 5,000/-. The revision petitioner now faces a sentence of simple imprisonment for a period of one month and to pay a fine of Rs. 5,000/-.

5. Before me, there is no representation for the respondent/complainant. The revision petitioner/accused has been heard. The learned Counsel for the petitioner assails the impugned concurrent verdict of guilty, conviction and sentence on the following grounds:

(i) The courts below erred in coming to the conclusion that the cheque - Ext.P1 was issued for the due discharge of a legally enforceable debt/liability.

(ii) The courts below erred in not coming to the conclusion that there was material alteration in Ext.P1 cheque.

(iii) The sentence imposed is excessive.

6. Grounds Nos. (i) and (ii): Ext.P1 is the cheque. It bears the signature of the accused. He has signed in the same as Proprietor of an establishment. It is not disputed that the cheque, after signing, was handed over to the complainant by the accused. We have the evidence of P.W.1 to prove execution. His evidence about execution and handing over the cheque is convincingly supported by the evidence of the accused as D.W.1. The silence and inaction of the accused, on receipt of the statutory notice of demand, compellingly corroborates the complainant's evidence and assures the court of the acceptability of the oral evidence of P.W.1. Signing, execution and handing over having thus been admitted, I find absolutely no merit in the contention that the cheque was intended to be issued to M/s Pala Timbers and not to the complainant. The totality of circumstances compellingly point to the correctness and acceptability of the concurrent conclusion of the courts below on this aspect.

7. A meaningless contention is raised that the seal of the establishment appearing in Ext.P1 is different from the seal appearing in the other admitted cheques. As already found by the courts below, no seal was at all necessary to ensure encasement of the cheque. It would be idle to assume that unnecessarily and without any purpose, a forged seal was affixed on the cheque by the accused. No other contentions are raised against the verdict of guilty and conviction u/s 138 of the N.I. Act. I find no reason to interfere with the verdict of guilty and conviction.

8. Coming to the question of sentence, the cheque is dated 17/9/93. A period of about 17 years has elapsed from the date of the cheque. I have already adverted to the principles governing imposition of sentence in a prosecution u/s 138 of the N.I Act in the decision reported in Anilkumar v. Shammy 2002 (3) KLT 852. I am satisfied that there are no compelling reasons which can persuade this Court to insist on imposition of any deterrent substantive sentence of imprisonment. Leniency can be shown on the question of sentence, but subject only to the compulsion of ensuring adequate and just compensation for the victim/complainant, who has been compelled to fight three rounds of legal battle by now and to wait from 1993 for the redressal of his grievances. However, notwithstanding the fact that the respondent/complainant is not represented before me at the hearing, I feel it necessary to ensure that the complainant is adequately compensated. The substantive sentence of imprisonment can be reduced and an appropriate direction for a fair compensation can be issued. A default sentence can also be imposed. The challenge in this revision petition can succeed only to the above extent.

9. In the result:

(a) This CrI.R.P is allowed in part;

(b) The impugned verdict of guilty and conviction of the petitioner u/s 138 of the N.I Act are upheld;

(c) But the sentence imposed is modified and reduced. In supersession of the sentence imposed on the petitioner by the courts below, he is sentenced to undergo imprisonment till rising of court. He is further directed to pay an amount of Rs. 30,000/- (Rupees thirty thousand only) as compensation u/s 357(3) Cr.P.C and in default to undergo simple imprisonment for a period of 28 days (4 weeks). If the compensation amount is paid, it shall be released entirely to the respondent/ complainant.

10. The learned Counsel for the petitioner submits that he is not sure whether the matter has been settled or not. If the matter has been settled, the complainant can report to the court below that he has received the compensation in full satisfaction and thereupon the default sentence shall not be executed. The revision petitioner will then be liable only to undergo the modified substantive sentence of imprisonment till rising of court.

11. The learned Counsel prays and I grant the petitioner time till 24/7/2010 to appear before the court below to undergo the modified sentence. The direction for payment of

compensation and the default sentence shall not be executed till then.

12. The petitioner shall appear before the trial court on 26/7/2010 for execution of the modified sentence. Needless to say, if the petitioner does not appear, the trial court shall be at liberty to proceed against the accused and the sureties u/s 446 of the Cr.P.C.