IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 20TH DAY OF JANUARY 2015/30TH POUSHA, 1936

Crl.Rev.Pet.No. 279 of 2004 (D)

AGAINST THE JUDGMENT IN CRL.A.NO.656/2002 of ADDL.SESSIONS COURT, N.PARAVUR DATED 18-11-2003

AGAINST THE JUDGMENT IN C.C.NO.303/1999 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, ALUVA DATED 06-09-2002

PETITIONER(S) : (APPELLANT - ACCUSED)::

K.M. POULOSE, KOORANKAROTTU VEETTIL,
ANGADIKKADAVU, ANGAMALY.

BY ADVS.SRI.T.K.VENUGOPALAN
SRI.DEVAN.V.

RESPONDENT(S) (RESPONDENT - COMPLAINANT & STATE)::
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1. STATE OF KERALA.

2. SAJU JOSEPH, SON OF JOSEPH,
PALAYIL, KARAYAMPARAMBU, KARUKUTTY,
ANGAMALY.

R1 BY PUBLIC PROSECUTOR SMT.V.H.JASMINE.
R2 BY ADV. SRI.PAUL K.VARGHESE

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 20-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K. Ramakrishnan, J.

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Crl.R.P.No.279 of 2004

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Dated this, the 20th day of January, 2015.

ORDER

Accused in C.C.No.303/1999 on the file of the Judicial First Class Magistrate Court-II, Aluva is the revision petitioner herein.

2. The case was taken on file on the basis of a private complaint filed by the second respondent under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act')

3. The case of the complainant in the complaint was that he and the revision petitioner were relatives and known to each other and he had purchased a Tanker Lorry with No.KL 7 J 8719 in the name of the revision petitioner and he was running the lorry for and on behalf of the revision petitioner and since there was some dispute arose regarding the vehicle, he had agreed to settle the claim for an amount of Rs.2,60,000/- and agreed to sell the vehicle to him again and accordingly, certain amounts were paid and an amount of Rs.2,00,000/- was due and in discharge of that liability, he had issued Ext.P1 cheque drawn on Central Bank of India in favour

of the complainant. The complainant presented the cheque for collection and the same was dishonoured for the reason 'funds insufficient' evidenced by Ext.P2 dishonour memo and the same was intimated to the complainant by his banker vide Ext.P3 intimation letter. Complainant issued Ext.P4 notice vide Ext.P6 postal receipt and the same was received by the revision petition evidenced by Ext.P5 postal acknowledgment. He had not paid the amount. So, he had committed the offence punishable under Section 138 of the Act. Hence the complaint.

4. When the revision petitioner appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and the Bank Manager was examined as PW2 and one witness was examined as PW3 and Ext.P1 to P8 were marked on his side. After closure of the complainant's evidence, the revision petitioner was questioned under Section 313 of Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that he was

innocent and the complainant was his driver. Except marking Ext.D1 and D2 - the copy of the reply notice and the postal acknowledgment, no other evidence was adduced on the side of the revision petitioner.

5. After considering the evidence on record, the court below found the revision petitioner guilty under Section 138 of the Act and convicted him thereunder and sentenced him to undergo simple imprisonment for six months. Aggrieved by the same, he filed Crl.Appeal No.656/2002 before the Sessions Court, Ernakulam which was made over to Additional Sessions Court, North Paravur for disposal and the learned Additional Sessions Judge dismissed the appeal confirming the order of conviction and sentence passed by the court below. Aggrieved by the same, the present revision has been filed before this court by the revision petitioner – accused before the court below.

6. Heard the Counsel for the revision petitioner and the second respondent and the Public Prosecutor.

7. The Counsel for the revision petitioner submitted that there is no scrap of paper produced on the side of the complainant to prove that he had purchased the vehicle in the

name of the revision petitioner and the amount as claimed by him was due. Further, the evidence of PW3 which has been relied on by the courts below is not sufficient to prove the case as he had no direct knowledge about the transaction between the complainant and the revision petitioner and also the issuance of the cheque. He had only hearsay knowledge about what was stated by PW1 about these things. So, under the circumstances, the courts below were not justified in coming to the conclusion that the accused had committed the offence punishable under Section 138 of the Act especially when he had rebutted the presumption and also proved that the case of the complainant is not probable or believable and he prayed for acquittal.

8. On the other hand, Counsel for the second respondent submitted that there is nothing to disbelieve the evidence of PW3 on this aspect as he was one of the person who interfered in the matter as a mediator along with one Josephane, the President of the Kerala Mahila Association and he had also stated that both the complainant, accused and Josephane and himself were present, in which, the matter had been discussed and the revision petitioner had admitted his

liability to pay the amount and he wanted only some time and he paid Rs.25,000/- in his presence and when the complainant told him that there was no payment thereafter, he advised him to file a complaint to the Circle Inspector of Police and accordingly, a complaint was filed and both the complainant and the accused were called and they were directed to settle the issues outside the police station and later, he told that the cheque was given, but it was dishonoured. Further, he had also argued that there is no consistent case for the revision petitioner as to how his cheque had reached the hands of the complainant. So, under the circumstances, courts below were perfectly justified in convicting the revision petitioner for the offence alleged and the transaction was of the year 1999 and no amount has been paid and he prayed for awarding compensation under Section 357(3) of Code of Criminal Procedure.

9. Heard the Public Prosecutor also.

10. The case of the complainant in the complaint was that, he purchased a Tanker Lorry in the name of the revision petitioner and since the hire amount was not paid to the financier and the liability increased on the vehicle, he wanted

to sell the vehicle and at that time, the revision petitioner himself had agreed to purchase the vehicle agreeing to pay the amount of Rs.2,60,000/- after agreeing to pay the hire charges to the financier. Subsequently, certain amounts were paid and when dispute arose, a mediation was held and in the mediation, he had agreed to pay the amount and after mediation, he paid some amount and since the balance amount was not paid, he filed a complaint before the Circle Inspector of Police and both of them were called to the office of the Circle Inspector and he directed them to settle outside and on the basis of the settlement, he gave Ext.P1 cheque. The case of the revision petitioner was one of total denial. He had send Ext.D1 reply notice, in which, he had stated that, there was no transaction between the complainant and himself and he had not issued any cheque and the cheque some how obtained by the complainant while he was working as a driver under him was misused and the notice was issued. It is true that in a case where the execution of the cheque is denied, the burden is on the complainant to prove the same. It is also settled law that the cases under Section 138 of the Negotiable Instruments Act, there is a statutory presumption in favour of the complainant that the cheque was issued in discharge of a legally enforceable debt, but, it is a rebuttable presumption.

11. In the decision reported in **Damodar S. Prabhu Vs. Sayed Babalal H. [JT 2010 (4) SC 457],** the Hon'ble Supreme Court has held that the court will have to draw the presumption under Section 139 of the Act if the complainant was able to prove the issuance of the cheque in discharge of the liability. Further, in the subsequent decision in **Somnath Sarkar Vs. Utpal Basu Mallick [2013(4) KLT 350 (SC)]**, the Hon'ble Supreme Court has even gone to the extent of saying that the presumption is not only in respect of issuance of the cheque and also in respect of existence of a liability as well. But, in the same decision, it has been observed that it is a rebuttable presumption and the accused can take up a defence that there is no liability and if such a defence is taken, it is for the court to consider the same on the basis of the evidence.

12. In this case, PW1 was examined and he had deposed in support of his case. He had narrated the circumstances under which the lorry happened to be purchased in the name of the revision petitioner and the amount due and

issuance of the cheque. It is true that he was not able to produce any document to prove this fact. But, the nature of cross examination of PW1 will go to show that even though the vehicle was purchased in the name of the revision petitioner, the complainant was in possession of the vehicle and managing the affairs and the suggestion also will indicate that when the CC charges could not be paid, the vehicle was returned to the revision petitioner. The revision petitioner had not adduced any evidence as under what circumstances the vehicle had to be returned to him. If really he was the owner of the vehicle, there was no necessity for entrusting the vehicle with the complainant as he can employ the complainant as a driver and pay his salary alone, that was not the trend of cross examination made by the defence when PW1 was in box. That shows that their relationship is more than an employer and an employee, but, there was some other transaction between them in respect of the vehicle involved in the case. Further, the evidence of PW3 - a mediator will go to show that he along with one Josephane, the President of Kerala Mahila Association interfered in the matter and at that time, the revision petitioner had admitted the entire transaction and admitted his liability to pay the amount to the complainant as well. He had also stated that an amount of Rs.25,000/- was paid in his presence, later, when the complainant made a complaint that balance amount was not paid, he advised him to file a complaint before the Circle Inspector of Police and accordingly, he along with the complainant went to the office of the Circle Inspector and filed a complaint and both the complainant and accused were called there and the Circle Inspector of Police directed them to settle the case outside the station. Accordingly, later, the complainant came and told that the revision petitioner had issued a cheque for Rs.2,00,000/- but, later it was dishonoured. It is true that regarding the amount due and issuance of the cheque etc., he had no direct knowledge and he had only hearsay knowledge about what PW1 had stated about the same. But, it was brought out in his evidence that in the discussion about the transaction in the settlement in the mediation, these things were admitted by the revision petitioner and he had admitted his liability to pay the amount also. So, under the circumstances, there is nothing to disbelieve the evidence of PW3 on this aspect and the courts below were perfectly justified in relying on the evidence of PW3 to come to the conclusion that the transaction stated by PW1 is more probable and believable than the case of the revision petitioner.

13. As regards the issuance of the cheque, the case of the revision petitioner was one of total denial. In the reply notice, his case was that the complainant was working as a driver under him and the cheque somehow obtained was misused and the notice was issued. But, at the time when PW1 was examined, his case was that, he has forged his signature and presented the cheque. No suggestion as to how he had come in the possession of the cheque. Further, in the 313 examination, he had no case as to how his cheque had reached the hands of the complainant. Further, when he came to know about the misuse of the cheque, he did not make any complaint to any authorities against the complainant also. It is brought out in evidence that the revision petitioner was a contractor of Bharath Petroleum and he was having number of vehicles for transporting oil from the corporation outlet to its dealers. So, under the circumstances, it cannot be said that he was not aware of the consequences of missing of a cheque or his cheque being in the possession of another person. So,

such a person, it cannot be believed, will be keeping quite if he came to know about the cheque being misused by some other person. He had no case that the cheque was not issued from the account maintained by him. Further, the documents produced by the complainant will go to show that the cheque was dishonoured for the reason 'funds insufficient' and not for the reason signature differs as well. Further, the evidence of PW2 coupled with Ext.P8 specimen signature card of the revision petitioner in the bank will go to show that the signature in Ext.P1 and the specimen signature card is one and the same as found by the courts below. He had not taken any steps to send Ext.P1 cheque for expert opinion to show that the signature in his cheque was not his. So, under the circumstances, courts below were perfectly justified in coming to the conclusion that the cheque was issued by the revision petitioner to the complainant for the amount due from him.

14. Counsel for the revision petitioner relied on the decision reported in **K. Subramani Vs. K. Damodara Naidu [(2015) 1 Supreme Court Cases 99]** where it was observed that the source of amount for payment of the amount has neither be spoken by the complainant nor stated anything

about the same in the complaint which creates doubt regarding the transaction. But, in this case, the complainant had stated the entire transaction and also the circumstances under which the cheque was issued in the complaint. Further, when he was examined before the court, he had also stated that the amounts were paid by stage by stage for the purpose of constructing the body of the vehicle and paying CC charges etc. The revision petitioner had not produced any document to show that he had paid the CC charges while the vehicle was in his possession as well as expected, he being the registered owner, he will be in possession of such documents if really he had paid the amount. So, all these circumstances will go to show that the case of the revision petitioner is not believable or probable and courts below were perfectly justified in coming to the conclusion that the complainant had established his case and the revision petitioner had committed the offence punishable under Section 138 of the Act and rightly convicted him for the said offence and the concurrent findings of the court below on fact do not call for any interference.

15. As regards the sentence is concerned, court below had sentenced him to undergo simple imprisonment for six

months and the same was confirmed by the appellate court. In the decision reported in **Damodar S. Prabhu Vs. Sayed Babalal H. [JT 2010 (4) SC 457],** the Hon'ble Supreme Court has held that the intention of the legislature in enacting Section 138 of the Act is to make a civil dispute into a criminal nature so as to make the drawer of the cheque to pay the amount and not with an intention to send him to jail. That was the reason why before filing a complaint, certain conditions will have to be satisfied by sending notice, giving an opportunity to the drawer of the cheque to pay the amount. So, considering the circumstances, this court feels that directing the cheque amount to be paid as compensation to the complainant with default sentence and also imposing a minimum substantive sentence of imprisonment till rising of court will be sufficient and that will meet the ends of justice in view of the dictum laid down in the decision reported in **Suganthi Vs. Jagadeeshan [2002 (1) KLT 581]** and **Damodar S. Prabhu Vs. Sayed Babalal H. [JT 2010 (4) SC 457]**. So, the sentence imposed by the courts below is set aside and the same is modified as follows:

The revision petitioner is sentenced to undergo imprisonment till rising of court and also to pay the cheque amount of Rs.2,00,000/- as compensation to the complainant (PW1) in default to undergo simple imprisonment for six months under Section 357(3) of Code of Criminal Procedure. Four months time is granted to the revision petitioner to pay the amount. Till then, the execution of sentence is directed to be kept in abeyance. If any amount has already been deposited by the revision petitioner for suspending the sentence, earlier directed by the Sessions Court and this court for suspending the sentence, then, the same is directed to be adjusted towards the compensation awarded by this court and the revision petitioner need pay only the balance amount. If any amount is so deposited, then, the lower court is directed to permit the complainant to withdraw that amount.

With the above modification of the sentence alone, the revision petition is allowed in part and disposed of accordingly.

Sd/-
K.Ramakrishnan, Judge.

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[True copy]

P.A to Judge