IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 7TH DAY OF OCTOBER 2015/15TH ASWINA, 1937

Crl.Rev.Pet.No. 2202 of 2003 ( )

AGAINST THE JUDGMENT IN CRL.A 807/2001 of ADDITIONAL SESSIONS COURT (ADHOC-I), ERNAKULAM DATED 11-04-2003

AGAINST THE JUDGMENT IN CC 72/1997 of ADDL.C.J.M.(ECONOMIC OFFENCES),ERNAKULAM DATED 06-10-2001

REVISION PETITIONER(S)/APPELLANT/3RD ACCUSED:

N.K. NARAYANANKUTTY, PARTNER,
MEDIA EXEMPLERS ADVERTISING AND MARKETING CONSULTANTS,
DORAISWAMY IYER ROAD, ERNAKULAM.

BY ADVS.SRI.P.VIJAYA BHANU
SMT.P.MAYA

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:
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1. THE MADRAS ADVERTISING COMPANY LTD., ANNA MALAI, MADRAS-2 AND BRANCH OFFICER, 41/416 HARI NIVAS, RAJAJI ROAD, ERNAKULAM, REPRESENTED BY ITS DY.FINANCE MANAGER, SAMPATH KUMAR.

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

R2 BY GOVT. PLEADER SMT. MADHU BEN
R1 BY ADV. SMT. PRIYA MAHESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07-10-2015, ALONG WITH CRRP.2205/2003, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

OKB

"C.R."

K.HARILAL, J.

Crl.R.P. Nos.2202 & 2205 of 2003

Dated this the 21st day of October, 2015.

COMMON ORDER

These Revision Petitions are filed challenging the concurrent findings of conviction entered and the sentence imposed on the Revision Petitioner/3rd accused for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') in Criminal Appeal Nos.807 and 808/2001 on the files of the Additional Sessions Judge (Ad hoc-I), Ernakulam. The above appeals were filed challenging the judgment whereby the Revision Petitioner was found guilty of the said offence, passed in C.C.No.72 & 71/1997 on the files of the Additional Chief Judicial Magistrate's Court,(EO), Ernakulam. According to the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment for three months each and to pay a fine of Rs.55,000/- each. In default of fine, he shall undergo simple imprisonment for one month. If the fine amount is realised, Rs.53,000/- out of each deposit shall be given to the complainant towards cost and compensation under Sec.357(1) of the Cr.P.C.

2. The complainant is a company doing business in advertising and the 1st accused is a partnership firm and accused 2 and 3 are its partners. The 1st accused had entered into a business deal with the complainant for publishing advertisement on their behalf and the business was on a credit basis. Accordingly, the complainant published advertisement of M/s. G.P.P. Narayaneeyam Trust and Ezhuthasan's Electronics (P) Ltd., as per the request of the accused and in that transaction, a sum of Rs.3,06,974/- due from the accused. In discharge of the said liability, the accused had issued two cheques drawn on the account maintained with the State Bank of Travancore, Overseas Branch, Ernakulam. The cheques are dated 20/10/1994 and 20/12/1994 respectively for Rs.1 lakh each and the same are marked as Exts.P3 and P4. Accused Nos.2 and 3 have signed in Exts.P3 and P4

cheques for and on behalf of the 1st accused/company. When those cheques were presented for encashment, the same were dishonoured and returned with an endorsement 'payment stopped by the drawer'. Though the complainant caused to issue a lawyer's notice demanding the cheques amounts, the accused has not paid the cheques amounts; but sent Ext.P13 reply notice denying the liability under the cheques. In the above context, the complainant preferred the above complaint against the accused under Sec.138 of the N.I. Act.

3. The accused pleaded not guilty of the offence alleged against them. To discharge the initial burden, the authorised person of the complainant was examined as P.W.1 and another witness was examined as P.W.2 and Exts.P1 to P21 were marked. After evaluating the evidence on record, the courts below concurrently found that the complainant has successfully discharged the initial burden to prove, execution and issuance of the cheques and thereby, the presumptions under Secs.139 and 118(a) of the N.I. Act would stand in favour of the complainant.

4. To rebut the presumptions under the N.I. Act, two witnesses, who are the present and former Managers of the Bank, were examined as D.W.1 and P.W.2 and Exts.D1 to D5 were marked. No oral evidence was adduced by the accused. The 2nd accused was examined as D.W.2. When questioned under Sec.313 of the Cr.P.C., the 3rd accused stated, as per the provisions of the Partnership deed, in order to operate the bank account of the firm, every cheque has to be signed by the Managing Partner with another partner. For that purpose, the 2nd accused used to obtain the signatures of the partners in blank cheques, in advance, for using the transaction of the 1st accused firm, and he also happened to put his signature in some blank cheques as demanded by the 2nd accused. He further stated that the 2nd accused had used blank cheques signed by him and those cheques were given to the complainant, without his knowledge or consent. But, when the 2nd accused was examined as D.W.2, he denied the allegation of the 3rd accused that he had obtained the signatures of the 3rd accused in blank cheques and those cheques were given to the complainant without the knowledge

or consent of the 3rd accused. Needless to say, the statements under Sec.313 of the Cr.P.C. given by the 3rd and 2nd accused are mutually destructive as well as oppositive. In short, in the statement under Sec.313 of the Cr.P.C., the 2nd and 3rd accused have no consistency in their pleadings. After analysing the evidence on record, the courts below concurrently found that the complainant has successfully discharged the initial burden and thereby, the presumptions under Secs.139 and 118(a) of the N.I. Act would stand in favour of the complainant and the accused miserably failed to rebut the presumptions which stood in favour of the complainant. The legality, propriety and correctness of this finding is under challenge in these revision petitions.

5. Heard the learned counsel for the revision petitioner.

6. The learned counsel mainly contended that since the memo to stop payment towards Exts.P3 and P4 was given to the Bank at the time when fund was available in the Bank, at the discretion of the Manager, the offence under Sec. 138 will not be attracted.

Secondly, it is contended that the complainant/ company has drawn and directly issued bills to the customers of the accused, namely, M/s. G.P.P. Narayaneeyam Trust and Ezhuthachan Electronics (P) Ltd., instead of sending the same to the 1st accused/company for payment. Unless the bills are not issued in favour of the 1st accused/company, the 1st accused/company is not liable to pay the amounts due under Exts.P3 and P4 cheques.

7. The question to be considered in these revision petitions is, whether there is any illegality or impropriety in any of the findings under which the conviction has been entered against the accused and sentenced them thereunder.

8. The scope of interference under the revisional jurisdiction is very limited and confined to examination of legality, propriety and correctness of the findings entered by the courts below only. There is no scope for re-appreciation of the evidence, unless it is found that the findings are perverse and unacceptable and even if an alternative view is possible, the revisional court is not inclined to

substitute its own views in lieu of the concurrent findings arrived at by the inferior courts.

9. With the above yardstick, I have examined the legality, propriety and correctness of the findings of the courts below in the impugned judgments under challenge.

10. Admittedly, Exts.P3 and P4 cheques were dishonoured owing to the instruction 'not to honour the cheques issued by the accused to the bank'. According to the accused, the cheques were issued as security only and the original bills were drawn and issued to the customers by name M/s.G.P.P. Narayaneeyam Trust and Ezhuthachan Electronics Pvt. Ltd. Therefore, they have no liability to honour the cheques, which were issued as security only. As regards the above reason for issuing the stop memo, it is seen that neither in the statement under Sec.313 of the Cr.P.C. nor in Ext.P13 reply notice sent by the accused, the accused have raised this contention denying the liability to honour the cheques for the aforesaid reason. In Ext.P13 reply notice, the contention raised by the accused was that the cheques

were issued as security for the payment, and the business transactions were conducted on credit basis. In short, the cheques were not issued with an intent to make payment, when those cheques were drawn. That apart, going by Ext.P18 letter sent by the accused to the complainant, it is stated that in spite of the best efforts, M/s.G.P.P.Narayaneeyam Trust and Ezhuthachan Electronics Pvt. Ltd. have not paid up the amount so far to them. Thus, during the course of trial, the accused had not raised a contention that they are not liable to pay the amount due under the cheques as the bills were drawn and issued directly to M/s.G.P.P.Narayaneeyam and Ezhuthachan Electronics Pvt. Ltd. Needless to say, the said contention does not find a place in the evidence on record and the same is put forward without any bona fides in these revision petitions.

11. As regards the contention that the cheques were issued as security, the courts below have rightly rejected the contention relying on the decision of the Apex Court in ICDS Ltd. v. Beena Shabeer and another [2006 SCC 426 = 2002 (3) KLT 218 (SC)]. As rightly

observed by the appellate court, in that case, the Apex Court held that the liability under Section 138 of the N.I. Act cannot be avoided even if the cheques stand returned by the banker as unpaid and the cheques issued as security for the payment in cash also would fall under the mischief within the purview of Section 138 of the N.I. Act, in case, the cheque is dishonoured and returned for want of sufficient funds. Therefore, I find that even if the defence taken by the accused during the course of trial is taken at its face value and admitted, that contention does not absolve the accused from the liability under Section 138 of the N.I. Act.

12. Thirdly, going by the depositions of D.W.1 and P.W.2, the then Bank Manager and former Bank Manager, they admitted that at the time when the cheques were presented for encashment, the credit facility available to the accused stood beyond its limit and according to the agreement between the bank and the accused the honouring of the cheque was within the discretion of the Manager only. Ext.P21 cash credit agreement of the accused shows that on the date of

presentation of the cheques the account of the accused stood beyond the cash limit and the accused had no right to withdraw any amount as of right. So, the accused has no right to claim for honouring the cheques as of right. In my view, unless sufficient amount is made readily available in the account of the drawer to withdraw or to pay by order, as of right, the drawer is liable to be prosecuted and punished for the offence under Section 138 of the N.I. Act. Put it differently, it was obligatory upon the drawer of the cheque, before issuing the same, to make sure that there is sufficient funds in his account to honour the cheque and the encashment of a cheque on pay order shall not be a matter left with the discretion of the Manager, when the drawer issues that cheque. Therefore, the evidence given by D.W.1 and P.W.2 to the effect that they could have honoured the cheques in exercise of their discretionary power goes without any value. There is no illegality or impropriety in any of the findings whereby the conviction was entered and the sentence was imposed on the revision petitioner. I do not find any perversity in the appreciation of evidence and I confirm the impugned judgments under challenge.

13. At last, the learned counsel for the revision petitioner submits that the sentence imposed on the revision petitioner is excessive and disproportionate with the nature and gravity of the offence under Section 138 of the N.I. Act. He urged for granting some time to pay the cheques amounts, if this revision petition is found meritless.

14. The Supreme Court, in the decision in Kaushalya Devi Massand v. Roopkishore [AIR 2011 SC 2566], held that the offence under Section 138 of the N.I. Act is almost in the nature of civil wrong which has been given criminal overtone, and imposition of fine payable as compensation is sufficient to meet the ends of justice. Further, in Vijayan v. Baby [2011(4) KLT 355], Supreme Court held that the direction to pay the compensation by way of restitution in regard to the loss on account of the dishonour of the cheque should be practical and realistic. So, in a prosecution under Section 138 of the N.I. Act, the compensatory aspect of remedy should be given much priority over

punitive aspect.

15. In the light of the above decisions, I find that the sentence imposed on the revision petitioner is not in conformity with the proposition laid down by the Apex Court in the above decisions. The substantive sentence of simple imprisonment for three months will stand reduced and modified to simple imprisonment for one day till rising of the court and the revision petitioner is given three months time to pay the fine amount. Consequently, in supersession of the sentence imposed by the trial court and confirmed by the appellate court, the revision petitioner will stand sentenced as follows:

i. The revision petitioner in each case shall undergo simple imprisonment for one day till rising of the court.

ii. In each case, he shall pay a fine of Rs.1,00,000/- (Rupees One lakh only) within a period of three months from today and the same shall be given to the complainant as compensation under Section 357(1)(b) of the Cr.P.C. If the complainant is not available, to receive the compensation, as ordered above, the petitioner is at liberty to deposit the said amount in the trial court within the specified time and in that event the complainant is allowed to realise the amount from the court on application.

iii. He shall appear before the Trial Court to suffer the substantive sentence of simple imprisonment as ordered above on or before 08.01.2016 with sufficient proof to show payment of fine.

iv. If the accused pays the compensation together, the substantive sentence of simple imprisonment for one day will stand run concurrently.

v. In default, he shall undergo simple imprisonment for a period of two months in each case.

vi. If the revision petitioner had deposited any amount in the trial court, in compliance with the direction of this Court or appellate court, that amount shall be given credit to and the balance alone need be paid as compensation. In that event, the 1st respondent/complainant is allowed to realise such deposit, if any.

The Criminal revision petitions are disposed of accordingly.

Sd/-
K. HARILAL, JUDGE

Nan/okb.