IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 12TH DAY OF JANUARY 2015/22ND POUSHA, 1936

Crl.Rev.Pet.No. 872 of 2004 (D)

AGAINST THE JUDGMENT IN Crl. APPEAL 163/2003 OF THE SESSIONS COURT, MANJERI, DATED 25-02-2004
&
AGAINST THE JUDGMENT IN CC 125/1999 of J.M.F.C.-II, PERINTHALMANNA, DATED 31.03.2003.

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

M.T. KUNHALI, S/O. AYAMU,
MANNARTHODIKA VEEDU, PORUR, WANDOOR,
MALAPPURAM DISTRICT.

BY ADV. SRI. BABU S. NAIR

RESPONDENT(S)/RESPONDENT/COMPLAINANT/STATE::

THE STATE OF KERALA,
REPRESENTED BY THE SUB INSPECTOR OF POLICE,
WANDOOR POLICE STATION - THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM
KOCHI-31.

BY PUBLIC PROSECUTOR SRI. K.K. RAJEEV.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K. RAMAKRISHNAN, J.

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Crl. R. P. No. 872 of 2004

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Dated this the 12th day of January, 2015

<u>O R D E R</u>

First accused in C.C.125/1999 on the file of the Judicial First Class Magistrate Court-II, Perintalmanna, is the revision petitioner herein. The appellant along with another person was charge sheeted by the Sub Inspector of police, Wandoor, in Crime No.83/1994 of that police station under Section 420 read with Section 34 of the Indian Penal Code.

2. The case of the prosecution in nut shell was that, on 08.01.1994, accused Nos. 1 and 2 in furtherance of their common intention of cheating the defacto-complainant on the promise of obtaining visa to the son of PW1 and induced PW1 to deliver ₹17,000/- and first accused issued a cheque for ₹17,000/- as security for the same, knowing that it does not belong to him, that belongs to 2nd accused and he

did not obtained the visa nor had he returned the amount. The cheque when presented was dishonoured for the reason ‘funds insufficient’ and 'signature differs'. In spite of notice issued, they did not pay the amount and thereby both of them have committed the offence punishable under Section 420 read with Section 34 of the Indian Penal Code.

3. After investigation, final report was filed and it was taken on file as C.C.No.125/1999 on the file of the Judicial First Class Magistrate Court-II, Perintalmanna. 2nd accused did not appear and first accused alone appeared. When he appeared before the court below, after hearing both sides, charge under Section 420 read with Section 34 of the Indian Penal Code was framed and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 8 were examined and Exts.P1 to P6 were marked on their side. After closure of the prosecution evidence, the revision

petitioner was questioned under Section 313 of the Code of Criminal Procedure and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had further stated that, he had not committed any offence and in fact he had in bona fide belief gave the cheque, as it is issued from his account and when he came to know about the dishonour of the cheque, he had paid the amount and he had not committed any offence. In order to prove his case, one witness was examined as DW1. After considering the evidence on record, the court below found the revision petitioner guilty under Section 420 of the Indian Penal Code and convicted him thereunder and sentenced him to undergo rigorous imprisonment for one year. Aggrieved by the same, he filed Crl.Appeal No.163/2003, before the Sessions Court, Manjeri, and the learned Sessions Judge by the impugned judgment dismissed the appeal, confirming the order of conviction and sentence passed by the court below. Dissatisfied with the same, the present revision has been filed by the revision petitioner/ first accused before the court below.

4. Heard both sides and perused the records.

5. The counsel for the revision petitioner submitted that, even going by the evidence adduced on the side of the prosecution, it will go to show that there was no inducement made by the revision petitioner, making PW1 to part with the amount. His evidence will go to show that, he suo moto came to the travel agency of the revision petitioner and on the belief that he will be able to get the visa, handed over the amount and it was he who had voluntarily gave the cheque as security to show his bona fides. The evidence of PW4 will go to show that he was taken to medical examination also on the bona fide belief, that he will be able to get the visa and handed over the same to him, but later he could not get the visa. According

to the revision petitioner, he had paid the amount and mis-using the cheque, a false complaint has been filed and no offence under Section 420 of the Indian Penal Code is attracted. The revision petitioner also submitted that, the sentence imposed is harsh.

6. On the other hand, the learned Public Prosecutor supported the concurrent findings of the court below on this aspect.

7. The case of the prosecution as emerged from the prosecution witnesses was as follows: PW1 is the father of PW4 and PW3 is a common friend of the revision petitioner and PW1. He came to know through PW6 that, Visa to Saudi Arabia is available with the revision petitioner and he told the same to him. On that basis, PW1 approached the revision petitioner in his travel agency, and at that time second accused was also present there and on enquiring with the second accused, it was revealed that, the

revision petitioner was sending persons to Gulf and on that belief, he had conversation with the revision petitioner about the arrangement of visa and he told that ₹40,000/- will be required, out of which he wanted ₹17,000/- as advance and he had also given Ext.P2 cheque for the said amount as security stating that in case the visa could not be obtained he can present the cheque and get the amount. It was on that basis, he had partly paid ₹17,000/- to the first accused, who is the revision petitioner herein. He did not make arrangements for the visa and when he wanted the amount back, as requested by him the cheque was presented and it was dishonoured for the reasons 'funds insufficient' and also 'signature differs' by Ext.P3 memo. When it was enquired, it was revealed that, the cheque does not belong to the revision petitioner and it belonged to the second accused and knowing that the cheque will not be honoured, he had given the cheque to get ₹17,000/- from the defacto-complainant. Thereafter he issued notice to both the revision petitioner and the second accused and the notice sent to the revision petitioner was returned with endorsement ‘unclaimed’. Though he make complaints to the police about the same, no action was taken. So he filed Ext.P1 complaint before the Judicial First Class Magistrate Court-II, Perintalmanna, which was forwarded to the police for investigation by the learned magistrate under Section 156(3) of the Code of Criminal Procedure and on receipt of the same, PW8 registered Ext.P6 first information report as Crime No.83/1994 of Wandoor police station against the revision petitioner and the second accused under Section 420 read with Section 34 of the Indian Penal Code. He conducted preliminary investigation. Thereafter the investigation was undertaken by PW7 and he gave Ext.P5 report, showing the name and address of the second accused. He completed the investigation and submitted final report in the matter.

8. PW6 was examined on the side of the prosecution to prove that, it was through him that PW3 had taken PW1 to the office of the revision petitioner to get visa, but he did not support the case of the prosecution. So he was declared hostile. But his evidence will go to show that, PW1 had gone to the office of the revision petitioner and he had paid ₹17,000/- for the purpose of arranging visa for his son, but later he came to understand that he had repaid the amount to PW1. Though he was hostile, his evidence can be relied on for the purpose of proving the fact that, on the promise of getting a visa for the son of PW1, PW1 had given ₹17,000/- and the revision petitioner had issued a cheque for that amount as security and later the visa transaction could not materialised. The evidence of PWs 1, 2, 3 and 4 will go to show that, they went to the office of the revision petitioner and had conversation with him regarding

obtaining visa for PW4 and payment of ₹17,000/- as requested by the revision petitioner as advance for that purpose and the revision petitioner giving Ext.P2 cheque as security for the same. These aspects were not disputed by the revision petitioner also.

9. The question is whether, the act of the revision petitioner will amount to cheating and whether it is only a breach of promise for getting the visa. The fact that, he had given Ext.P2 cheque which does not belong to him as a security for the amount obtained and it was returned for the reason 'funds insufficient' and 'signature differs' and in spite of notice issued, he did not pay the amount will go to show that, even at the time when he had received the amount, he had the dishonest intention of not paying the amount to PW1.

10. Further DW1 was examined on the side of the revision petitioner to prove that he had repaid the

amount, but a reading of his evidence will go to show that his evidence is not believable and he was the class mate of the revision petitioner and he is trying to help the revision petitioner on this aspect. Further a person who is conducting a travel agency and person who was engaged in arranging visa even according to the witnesses had not obtained any document from PW1, when he paid the amount covered by Ext.P2 cheque and without getting back Ext.P2 cheque, he had paid the amount etc., cannot be believed and it cannot be said that he was not aware of the cheque being in the possession of another person, which has been dishonoured for the reasons 'funds insufficient' and 'signature differs' as well. So under the circumstances, the submission made by the counsel for the revision petitioner that, even if the entire evidence is accepted, it will only amount to breach of promise and no offence of cheating as defined under Section 420 of the Indian Penal

Code has been made out cannot be accepted. The conduct of the revision petitioner at the time when he issued the cheque when he made PW1 to part with the amount and he did not pay the amount when the cheque was dishonoured will go to show that he had the dishonest intention of not obtaining visa and making PW1 to believe that he will be able to arrange visa and make him to part with the money which he had received for this purpose. So under the circumstances, courts below were perfectly justified in coming to the conclusion that prosecution had proved beyond reasonable doubt that the first accused/revision petitioner had committed the offence punishable under Section 420 read with Section 34 of the Indian Penal Code and the concurrent findings of the court below on this aspect do not call for any interference.

11. Regarding of the sentence imposed is concerned, the lower court sentenced him to undergo

rigorous imprisonment for one year, which was confirmed by the appellate court as well. It may be mentioned here that the prosecution had no case that, the revision petitioner had engaged in cheating others by promising to obtain visa and collected amounts from others as well. Except this transaction, there is no other evidence to show that, he had cheated any other person as well. So under the circumstances, this court feels that the sentence of one year rigorous imprisonment imposed by the court below is harsh and make him to compensate the loss caused to the defacto-complainant will be sufficient and that will meet the ends of justice. So considering the circumstances, the sentence imposed by the court below and confirmed by the appellante court is set aside and the same is modified as follows:

The revision petitioner is sentenced to undergo imprisonment till rising of the court and also to pay a compensation of ₹20,000/- to the defacto-complainant, in default to undergo simple imprisonment for three months under Section 357(3) of the Code of Criminal Procedure. Two months time is granted to the revision petitioner to pay the amount and serve the sentence. He is directed to appear before the court below on 12.03.2015 to comply with the directions, till then, the execution of sentence is directed to be kept in abeyance.

With the above modification of the sentence alone, the revision petition is allowed in part and disposed of accordingly. Office is directed to communicate this order to the concerned court, immediately.

Sd/-
K. RAMAKRISHNAN, (Judge)

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P.A. to Judge

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