

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

Cr1.Rev.Pet.No. 659 of 2006  
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AGAINST THE JUDGMENT IN CRL.A.NO. 812/2005 of II  
ADDITIONAL DISTRICT COURT, ERNAKULAM DATED 20-01-2006.

AGAINST THE JUDGMENT IN CC 883/2001 of J.M.F.C.,  
KOLENCHERRY DATED 31-08-2005

REVISION PETITIONER/APPELLANT/ACCUSED:  
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PARASARAN, S/O.MOHANAN,  
PULLARKATTU HOUSE, INCHATHOTTY KARA,  
KUTTAMPUZHA P.O.

BY ADVS.SRI.PRAKASH P.GEORGE  
SRI.B.PREMNATH  
SRI.BOBAN VARGHEESE

RESPONDENT(S)/COMPLAINANT AND STATE:  
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1. THANKAMMA, W/O.SURENDRAN,  
MOLATH PUTHENPURAYIL HOUSE, CHALIKKARA,  
KUZHIKKADU P.O., AMBALAMEDU.

2. STATE OF KERALA, REPRESENTED BY  
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM-682 031.

R1 BY ADV. SRI.KRISHNADAS P. NAIR  
R2 BY PUBLIC PROSECUTOR SRI. JUSTINE JACOB

THIS CRIMINAL REVISION PETITION HAVING BEEN  
FINALLY HEARD ON 16-07-2015, THE COURT ON THE SAME DAY  
PASSED THE FOLLOWING:

**K. HARILAL, J.**

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**Crl.R.P. No. 659 of 2006**  
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**Dated this the 16<sup>th</sup> day of July, 2015**

**ORDER**

This Revision Petition is filed challenging the concurrent findings of conviction entered and the sentence imposed on the Revision Petitioner for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') in Criminal Appeal No.812 of 2005 on the files of the II Additional Sessions Judge, Ernakulam. The above appeal was filed challenging the judgment whereby the Revision Petitioner was found guilty of the said offence, passed in C.C.No.883 of 2001 on the files of the Judicial First Class Magistrate's Court, Kolencherry. According to the impugned judgment, the Revision Petitioner stands sentenced to undergo

simple imprisonment for one day till rising of the court under Sec.138 of the N.I., Act and directed to pay a compensation of ₹40,000/- to the complainant under Sec.357(3) of the Cr.P.C. In default of payment of compensation, the accused shall undergo simple imprisonment for two months.

2. The complainant's case is as follows: The brother of the accused purchased a property from the complainant and at the time of registration of the same, the accused had issued Ext.P1 cheque for Rs.37,000/- towards the payment of balance sale consideration. When the said cheque was presented for encashment, the same was dishonoured and returned for want of sufficient funds. Even after the receipt of lawyer's notice, the accused didn't pay the cheque amount; nor did he sent a reply denying the liability.

3. Per contra, the accused contended that the cheque was given as security for payment of advance

amount and the entire sale consideration was paid at the time of execution of the sale deed; but the complainant has not returned the cheque. Thus, the cheque in question was not issued in discharge of any debt or liability.

4. The courts below, on an appraisal of evidence let in by the complainant consists of the oral evidence of the complainant and Exts.P1 to P6, concurrently arrived at a finding that the complainant has successfully discharged the initial burden to prove, execution and issuance of the cheque and thereby, the presumptions under Secs.139 and 118(a) of the N.I. Act would stand in favour of the complainant.

5. To rebut the presumptions, no evidence was adduced by the accused, except Ext.D1. Ext.D1 is the sale deed by which the brother of the accused purchased the said property from the complainant. During cross-examination of P.W.1, a suggestion was put to P.W.1 that at the time of agreement for sale, a

sum of Rs.3,000/- was paid in cash and Ext.P1 cheque was given as security. Later, at the time of execution of Ext.D1 sale deed, the accused had paid the entire sale consideration and got executed Ext.D1. If that be so, why didn't he get back Ext.P1 cheque which was allegedly issued as a signed blank cheque? It is contended that when he demanded back the blank cheque, the complainant told him that he had misplaced the cheque and promised not to use the same. At this juncture, it is pertinent to note that the accused didn't mount the witness box to swear as to the circumstances in which he had issued Ext.P1 cheque and the circumstances in which he didn't get back the cheque. The above explanation cannot be swallowed without a pinch of salt. If it was misplaced, he could have obtained a written acknowledgment stating the receipt of the cheque and subsequent misplacement of cheque from the complainant. The failure to enter the witness box so

as to deny an opportunity to the complainant to cross-examine him, unerringly pointing towards the lack of truth and bona fides in the said contention. That apart, in spite of receipt of Ext.P4 lawyer's notice, he kept mum and he put forward the defence contention at the time of examination of P.W.1 only. The impugned judgment shows that even though 11 opportunities were given to the accused to adduce defence evidence, he could not produce any kind of defence evidence. In this analysis, the courts below are justified in finding that the complainant has successfully discharged the initial burden; but the accused has miserably failed to rebut the presumptions under the N.I. Act which stood in favour of the complainant.

6. The learned counsel for the petitioner drew my attention to Sec.92 of the Indian Evidence Act and pointed out that the complainant's contention that the cheque was issued for the payment of balance sale

consideration is hit by Sec.92 of the Indian Evidence Act. But, I find that the above provision has no application in the instant case, when the case of the complainant is that the entire consideration of the sale was paid at the time of registration by cash and cheque. The complainant has no case that at the time of registration, no consideration was given contrary to the statement in the sale deed. Consideration of the sale can be given either in cash or by cheque. If the cheque which was given as consideration is dishonoured, it cannot be held that the prosecution against the vendee would be hit by Sec.92 of the Indian Evidence Act; because the cause of action in this case arises only on dishonour of the cheque and the prosecution is launched on dishonour of the cheque for want of sufficient funds. Thus, the complainant has not adduced any evidence contradicting, varying, adding to or subtracting from the averments in the sale deed. Hence the contention

raised by the learned counsel for the petitioner stands rejected.

7. At last, the learned counsel for the petitioner contends that the sentence imposed on the revision petitioner is disproportionate with the nature and gravity of the offence and further sought for some time to pay the compensation, if this revision petition is found meritless, as the accused is unable to raise the amount forthwith due to paucity of funds.

8. 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 vs. 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.

9. In view of the above decisions and the submissions made at the Bar seeking time to pay compensation, the petitioner is given four months time to pay the compensation. Consequently, this Revision Petition will stand disposed of subject to the following terms.

i. The Revision Petitioner shall undergo simple imprisonment for one day till rising of the court.

ii. The Revision Petitioner shall pay ₹40,000/- (Rupees Forty thousand only) to the 1<sup>st</sup> respondent/complainant as compensation under Sec.357(3) of the Cr.P.C. within a period of four months from today.

iii. The Revision Petitioner shall appear

before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 16/11/2015 with sufficient proof to show payment of compensation.

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of two months.

v. If he had deposited any amount in the trial court towards compensation or fine, the same shall be given credit to and the balance alone needs to be paid as compensation or fine, as the case may be, and in that event, the complainant is allowed to realise such deposit from the court.

The Criminal Revision Petition is disposed of accordingly.

Sd/-  
**(K. HARILAL, JUDGE)**

**Nan/      //true copy//      P.S. to Judge**