

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

TUESDAY, THE 21ST DAY OF JULY 2015/30TH ASHADHA, 1937

Crl.Rev.Pet.No. 745 of 2006 ()

**AGAINST THE JUDGMENT IN CRA 313/2004 of ADDL.SESIONS COURT (ADHOC)-II,
THODUPUZHA DATED 16-01-2006**

**AGAINST THE ORDER IN CC 65/2004 of J.M.F.C-THODUPUZHA
DATED 18-10-2004**

REVISION PETITIONER(S)/APPELLANT/ACCUSED::

**T.H. NOUSHAD, S/O. HASSAN KHANI,
THAIPARAMBIL VEETIL, THODUPUZHA VILLAGE
THODUPUZHA TALUK.**

BY ADV. SRI.UNNIKRISHNAN.V.ALAPATT

RESPONDENT(S)/RESPONDENTS/COMPLAINANT::

- 1. THE STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**
- 2. K.P. BASHEER, S/O. PAREETH,
KALLIKUNNEL VEETIL, THODUPUZHA VILLAGE
THODUPUZHA TALUK.**

**R1 BY ADV. PUBLIC PROSECUTOR SRI.JIBU P.THOMAS
R2 BY ADV. SRI.P.M.ZIRAJ**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
21-07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

AD

K.HARILAL, J.

Crl.R.P No. 745 of 2006

Dated this the 21st 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.313/04 on the files of the Additional District & Sessions Judge, Thodupuzha. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.65/04 on the files of the Judicial First Class Magistrate's Court, Thodupuzha. According to the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment for 6 months for the offence under Section 136 of the Negotiable Instruments Act. Since the complainant sustained monetary loss due to the act of the accused, he is directed to pay the cheque

amount ie.Rs.80,000/- as compensation to PW1 under Section 357(3) of Cr.P.C. In default of payment of compensation simple imprisonment for three months.

2. The case of the complainant is that the accused borrowed an amount of Rs.80,000/- from the complainant in agreement to repay it on demand with interest at the rate of 12% per annum. When the complainant demanded the said amount, the accused drawn and issued Ext.P1 cheque for an amount of Rs.80,000/- to the complainant, and when he presented the said cheque for encashment, the same was dishonoured and returned from the Bank due to want of sufficient fund. Though he had caused to issue a lawyer's notice demanding the cheque amount, he did not pay the cheque amount; nor did he send a reply for the said liability.

3. When the accused was questioned under Section 313 of the Cr.P.C, it was stated that he had borrowed an amount of Rs.10,000/- from the complainant

on interest and then blank signed cheque was issued to the complainant as security. To prove the said contention DWs 1 to 3 were examined on the side of the accused. But the case of the accused, when the complainant was cross examined, was that he had borrowed Rs.5,000/- from the complainant in June 2003 on interest at the rate of Rs.5% per month and on that time, he had given two signed blank cheques and signed stamp paper as security to the complainant, and when a dispute arose, as regards the rate of interest, the complainant misused one of the cheque leaves and instituted the complaint.

4. Going by the defence version itself, it could be seen that the versions raised in 313 statement and the evidence disclosed by the examination of DWs 2 to 4 are inconsistent. After evaluating the evidence of DW 2 and DW3, the court below concurrently observed that the evidence of DW 2 and DW 3 is unreliable and untrustworthy. I do not find any perversity in the appreciation of evidence. There is no illegality or

impropriety in the impugned judgment.

5. The learned counsel for the Revision Petitioner reiterated the contentions which were raised before the courts below and got rejected concurrently. The learned counsel urged for a re-appreciation of evidence once again, which is not permissible under the revisional jurisdiction unless any kind of perversity is found in the appreciation of evidence. The Revision Petitioner failed to point out any kind of perversity in the appreciation of evidence or illegality or impropriety in the findings whereby the trial court convicted him.

6. The courts below had concurrently found that the 2nd respondent had successfully discharged initial burden of proving execution and issuance of the cheque; whereas the Revision Petitioner had failed to rebut the presumption under Section 118(a) and 139 of the N.I. Act which stood in favour of the 2nd respondent. So also, it is found that the debt due to the 2nd respondent was a legally enforceable debt and Ext.P1 cheque was duly

executed and issued in discharge of the said debt.

7. This Court is satisfied that the courts below had meticulously evaluated the evidence on record. I do not find any kind of illegality or impropriety in the said findings or perversity in appreciation of evidence, from which the above findings had been arrived. Therefore, I am not inclined to re-appreciate entire evidence once again and I confirm the concurrent findings of conviction.

8. At last, the learned counsel for the Revision Petitioner submits that the sentence imposed on the Revision Petitioner is disproportionate with the gravity and nature of the offence contemplated under Section 138 of the N.I.Act. The learned counsel further sought for some time to pay the compensation in case the Revision is found meritless, as he is unable to raise the said amount forthwith due to paucity of funds.

9. Similarly, the substantive sentence imposed on the revision petitioner is too harsh and excessive. The learned counsel for the revision petitioner prayed for

setting aside the sentence of imprisonment also. If the revision petitioner is incarcerated for a period as ordered by the courts below, the entire family will put in great hardship.

10. 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.

11. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and

submission made at the Bar, I am inclined to grant 3 months time to pay the compensation. Similarly, the substantive sentence of simple imprisonment for six months imposed on the revision petitioner is reduced and modified to simple imprisonment for one day till rising of the court. 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 a compensation of Rs.80,000/- (Rupees Eighty thousand only) to the 2nd respondent within a period of 3 months from today. If the petitioner had deposited any amount towards compensation, in compliance with the interim order of this Court or the Appellate Court, the same shall be given credit to and the balance alone needs to be paid as compensation. In that event, the complainant is allowed to realise the said amount from the Court.

iii. The Revision Petitioner shall appear before the

Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 26.10.2015 with sufficient proof to show payment of compensation .

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of 3 months.

The Criminal Revision Petition is disposed of accordingly.

Sd/-
K.HARILAL,
JUDGE

//TRUE COPY//

P.A. TO JUDGE

AD