

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

Crl.Rev.Pet.No. 197 of 2007 ()

Crl.Appeal 264/2005 OF FIRST ADDITIONAL SESSIONS COURT, THRISSUR

CC 804/2001 of J.M.F.C.-III,THRISSUR

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**DAYANAND PANDATH, AGED 39,
S/O.PANDATH KORU, CHIRAKEKOD P.O., VELLANIKARA
THRISSUR TALUK, THRISSUR DISTRICT.**

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT(S)/RESPONDENTS/RESPONDENTS/COMPLAINANT:

**1. RAJAN, AGED 44, S/O KIZHUTHANY KUMARAN,
VALLAKUNADHUSSEERI DESOM, CHOWUR VILLAGE
THRISSUR TALUK.**

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

**R,R.1 BY ADV. SRI.JIJO PAUL
R2 BY SR.PUBLIC PROSECUTOR SRI.K.K.SAIDALAVI**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
06-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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K.HARILAL, J.

Crl.R.P. No.197 of 2007

Dated this the 6th day of March, 2015

ORDER

The Revision Petitioner is the accused in C.C. No.804/2001 on the files of the Judicial First Class Magistrate Court - III, Thrissur, as well as the appellant in Crl.Appeal No.264/2005 on the files of the First Additional Sessions Court, Thrissur. He was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act on a complaint filed by the first respondent.

2. The case of the first respondent is that the petitioner had borrowed an amount of Rs.1,10,000/- from the respondent and he issued Exhibit P1 cheque for the said amount in favour of the respondent. When he presented the said cheque, the same was dishonoured and returned for want of sufficient funds in the account of the petitioner. Though the respondent caused to issue a lawyer's notice and the same was returned as unclaimed.

Thus the petitioner has committed an offence punishable under Section 138 of the Negotiable Instruments Act.

3. The petitioner contended that Exhibit P1 cheque was not issued in discharge of a legally enforceable liability as there was no transaction between the petitioner and respondent as alleged in the complaint. He admitted that, Exhibit P1 cheque was one issued as a security when he purchased gold ornaments from the shop of the respondent under Exhibit D2 chit. It is his contention that Exhibit P1 cheque was given to the respondent as a blank signed cheque. Though he has discharged the debt under Exhibit D2, the said blank signed cheque was not returned and thereafter misused for prosecuting the petitioner with an intention to release more amounts from the petitioner. After considering the evidence on record, the learned Magistrate found that the petitioner guilty of the offence under Section 138 of the Negotiable Instruments Act and convicted thereunder. He was sentenced to undergo a simple imprisonment for six months and to pay Rs.1,10,000/- as

compensation to the respondent under Section 357(3) of Cr.P.C and in default to undergo simple imprisonment for one month. Though he challenged conviction and sentence in the above appeal the Appellate Court also after re-appreciating the evidence on record confirmed the verdict of guilty, but modified the sentence of simple imprisonment for six months was modified to simple imprisonment for 15 days and the remaining part of the sentence was maintained as such without any interference. This revision petition is filed challenging the legality and propriety of the concurrent findings of conviction and modified the sentence imposed thereunder.

4. Though this Revision Petition has been filed on various grounds challenging the appreciation of evidence . The learned counsel for the petitioner mainly canvassed the point, the respondent failed to prove the original transaction and the averments in the complaint do not disclose any particulars of the original transaction. Therefore, the court below ought to have found that the

respondent miserably failed to discharge the initial burden of proof. Per contra, the learned counsel for the respondent advanced arguments to justify the concurrent findings of the conviction. According to him, the respondent was examined as PW1 and Exhibits P1 to P6 were marked to prove the drawing and issuance of the cheque, to the respondents. It is also pointed out that, though PW1 was cross examined at length and into minute details, nothing brought out to discredit the evidence of PW1 as regards the issuance of the cheque to him.

5. In view of the rival contentions, the short question that arises for consideration is whether the respondent has discharged his initial burden of proving, execution and issuance of the cheque as contemplated under Section 138 of the Negotiable Instruments Act. Going by **2010 (2) KLT 397 Devan v. Krishnan Menon**, this Court held that, the complainant need not establish the original cause of action in detail. In **AIR 2002 Supreme Court 182 in M/s. M.M.T.C. Ltd. and**

another v. M/s. Medchl Chemicals and Pharma(P) Ltd. and another, the Apex Court held that, there is no requirement that the complainant must specifically allege in the complaint and prove that there was a subsisting liability. It is also contended that Exhibit P1 cheque was issued as a security in connection with the purchasing of gold from the respondent's shop under Exhibit D2. Even if that be so, there is not legal bar for presenting the cheque for encashment and also for prosecution under Section 138 of the Negotiable Instruments Act, if the cheque is dishonoured for want of sufficient funds. The above is supported by the decision of this Court in **2012 (4) KLT Short Note 35, Mohanachandran Nair v. Cherian**. In this decision, this Court held that, there is no bar in presenting a cheque which was given as security for launching prosecution upon the dishonour of such cheque. Thus it could be safely concluded that the contention raised by the learned counsel for the petitioner has been covered by the decisions referred above. I find that, there is no illegality or impropriety in

any of the findings in the impugned judgment and there is no perversity in the appreciation of evidence from which these findings have arrived at. In the above view, conviction will stand confirmed.

6. Coming to sentence, the learned counsel for the petitioner contended that, modified sentence imposed by the Trial Court is disproportionate with the nature and gravity of the offence and excessive. The learned counsel has urged for granting six months time to pay the compensation. The learned counsel for the respondent submits that the petitioner has already taken sufficient time to pay the compensation so a reasonable time alone can be given to pay the compensation.

7. The Supreme Court, in the decision in **Kaushalya Devi Massand Vs. 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.

In view of the above decisions, I am of the opinion that the sentence imposed on the petitioner is a little excessive and a reasonable time can be given to pay the compensation. The petitioner is given three months time to pay the compensation. Hence, in supersession of the sentence imposed by the Appellate Court, the petitioner will stand sentenced as follows:

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

ii. He shall pay a compensation of Rs.1,10,000/- to the complainant/first respondent under Section 357 (3) of the Cr.P.C. within a period of three months from

today.

iii. He shall appear before the Trial Court to suffer a substantive sentence of simple imprisonment for one day, as ordered above, on or before 6th June, 2015 with sufficient proof to show the payment of compensation.

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

Sd/-
K.HARILAL, JUDGE

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PA TO JUDGE

