

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 17TH DAY OF JULY 2015/26TH ASHADHA, 1937

Cr1.Rev.Pet.No. 366 of 2007 ()

CRL.A 597/2005 of ADDL.DISTRICT & SESSIONS COURT, FAST TRACK
(ADHOC) , MAVELIKARA

CC 1312/2002 of J.M.F.C. , MAVELIKARA

REVISION PETITIONER/APPELLANT/ACCUSED :

JAYAN, AGED 39 YEARS,
S/O.APPUKUTTAN, VARICKOLIL VEEDU, EVOOR NORTH
EVOOR P.O.

BY ADVS.SRI.B.UNNIKRISHNA KAIMAL
SRI.V.MADHUSUDHANAN
SRI.V.VENUGOPAL

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE.:

1. J.RETNAMMA, AGED 59 YEARS,
W/O.SANTHAPPAN, SANTHALAYAM, EVOOR SOUTH
KEERIKKAD P.O.

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

R1 BY ADV. SRI.B.RENJITHKUMAR
R2 BY PUBLIC PROSECUTOR SRI.JIBU.P.THOMAS.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 17-07-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

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K.HARILAL, J.

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Crl.R.P.No. 366 of 2007

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Dated this the 17th 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.597/2005 on the files of the Additional District & Sessions Judge, Fast Track (Adhoc), Mavelikkara. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.1312/2002 on the files of the Judicial First Class Magistrate's Court, Mavelikara. According to the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment for a period of one year and to pay ₹1,60,000/- as compensation under Section 357(3)

Cr.P.C to the complainant and in default, to undergo simple imprisonment for six months.

2. The case of the complainant is that the accused had borrowed a sum of ₹1,50,000/- from her and in discharge of liability, he had issued Ext.P1 cheque dated 10.7.2002. When the cheque was presented for encashment, the same was dishonoured and returned for want of sufficient funds. Though she caused to issue a lawyer's notice, the same was returned and dishonoured for want of sufficient funds. To discharge the initial burden of proving execution and issuance of the cheque, the complainant was examined as PW1 and Exts.P1 to P7 were marked. After evaluating the said evidence, the courts below found that the complainant has successfully discharged the initial burden of execution and issuance of the cheque. I do not find any reason to interfere with the said finding.

3. What remains to be considered is, the accused rebutted the presumptions under Sections 139 and 118(a) of the N.I.Act with the standard of preponderance of

possibilities. In the statement filed under Section 313 of the Cr.P.C, he denied the transaction with the complainant. He contended that he had a transaction with the husband of the complainant that he pledged the ring with him in the financial institution run by the husband of the complainant, which is evidenced by Ext.D1. Thus, he obtained ₹10,000/- from the husband of the complainant for which he executed a blank signed cheque and signed stamp paper. The complainant foisted a false case against the accused by misusing the said cheque. It is also contended that the statutory notice under Section 138(b) was not properly served to him and therefore, the complaint was also not maintainable. To substantiate the above transaction, no evidence either oral or documentary had been adduced except Ext.D1. In the absence of any material to prove the said transaction with the accused, the courts below is justified in finding that the accused failed to rebut the presumption which stood in favour of the complainant with regard to the non receipt of notice. Though DW1 was examined as a defence witness, he deposed that he has

given due intimation in the address mentioned in the complaint and the notice was not accepted even after intimating the fact to the party. Though Ext.D1 receipt was produced to prove that she was residing at Gokulam, Evoor South, Keerikad, as rightly observed by the court below, Ext.D1 receipt is dated 17.11.2001 and Ext.P1 cheque is dated 10.7.2002. So, even if Ext.D1 receipt is taken at its face value to show that he is residing in the address shown in the receipt, it cannot be held that he was residing in that address when he issued the cheque in favour of the complainant. Therefore, in view of the decision laid down in **Bhaskaran Nair v. Abdul Kareem** (2006 (4) KLT 48), it can be held that notice was duly served to the accused as provided under Section 138(b) of the N.I.Act.

4. 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.

5. The courts below had concurrently found that the complainant/1st 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 1st respondent. So also, it is found that the debt due to the 1st respondent was a legally enforceable debt and Ext.P1 cheque was duly executed and issued in discharge of the said debt.

6. 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.

7. 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 as he is unable to raise the said amount forthwith due to paucity of funds.

8. 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.

9. 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.

10. 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 three months time to pay the compensation. Similarly, the substantive sentence of imprisonment is reduced and modified to simple imprisonment for one day till rising of the court. 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 shall undergo simple imprisonment for one day till rising of the court.

ii. The Revision Petitioner shall pay a compensation of Rs.1,60,000/- (Rupees One lakh Sixty thousand only) to the 1st respondent within a period of three months from today.

If the petitioner had deposited any amount in the trial court in compliance with the interim order of this Court or appellate court, the same shall be given credit to and the balance alone needs to be paid as compensation.

iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 19th October, 2015 with sufficient proof to show payment of compensation .

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

The Criminal Revision Petition is disposed of accordingly.

Sd/-
K.HARILAL, JUDGE.

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P.A to Judge