IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

Crl.Rev.Pet.No. 741 of 2005

Crl.A 94/2003 of ADDL. SESSIONS JUDGE, NORTH PARAVUR
DATED 16-02-2005

ST 2428/1999 of J.M.F.C., NORTH PARAVUR DATED 06-01-2003

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

K.V.SEBASTIAN, KANJOOTHARA,
KOTTUVALLI, KAITHARAM, NORTH PARUR.

BY ADVS.SRI.SIBY MATHEW
SRI.PHILIP J.VETTICKATTU

RESPONDENT(S)/RESPONDENT & COMPLAINANT:
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1. THE ERNAKULAM DISTRICT LABOUR-CUM-DEVELOPMENT CO-OPERATIVE BANK LTD.-E 309 NORTH PARAVUR, REPRESENTED BY THE MANAGER.

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

R1 BY ADVS. SRI.BABU KARUKAPADATH
SRI.K.A.NOUSHAD
R2 BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 29-06-2015, ALONG WITH CRRP. 742/2005, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K.HARILAL, J.

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Crl.R.P.Nos.741 & 742 of 2005

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Dated this the 29th day of June, 2015

ORDER

These revision petitions are heard together and disposed of by a common judgment on the reason that the matter in issue is same and the facts constituting the offence alleged against the revision petitioner are similar. The revision petitioner in both revision petitions are one and the same and the respondents are also the same. Crl.R.P.No.741/2005 is filed against the concurrent findings of conviction and sentence imposed on the revision petitioner in S.T.No.2428/1999 of Judicial First Class Magistrate's Court, N.Paravur, Crl.R.P.No.742/2005 is filed against the concurrent findings of conviction and sentence in S.T.No.41/1999 on the files of the Judicial First Class Magistrate's Court, N.Paravur and confirmed in appeal by the Additional Sessions Judge, N.Paravur in

Crl.A.Nos.94/2003 & 95/2003 respectively. In both cases, the facts are similar and the same is given as follows: The accused had auctioned the right to cultivate prawns in the field belonged to the complainant for a total amount of Rs.3,45,000/-, out of which, the accused had remitted deposit and initial instalments. Towards the balance of Rs.1,72,500/-, the revision petitioner executed two cheques for Rs.86,250/- each dated 1.4.1998 and 1.6.1998 and issued to the 1st respondent. Those cheques got dishonoured and returned for want of sufficient funds, when presented for encashment. Though the complainant had caused to issue a lawyer notice, the accused sent a reply stating untenable conditions.

2. The accused entered appearance and pleaded not guilty. The complainant examined P.W.1 and Exts.P1 to P10 were marked. D.Ws.1 and 2 were examined and Exts.D1 to D3 were marked for the accused. After considering the rival pleas, the court below found the accused guilty of the said offence and convicted thereunder. He was sentenced

to undergo simple imprisonment for a period of one month and to pay a compensation of Rs.15,000/- to the complainant under Section 357(3) of the Cr.P.C. If the compensation is not paid, he shall undergo simple imprisonment for 15 days more. Same sentence is passed in both cases. Aggrieved by the conviction and sentence imposed by the trial court, though the accused preferred the above appeals, after re-appreciating the evidence on record, the learned Sessions Judge also concurred with the verdict of guilty and confirmed the conviction and sentence as such, without any interference. The legality and propriety of the findings whereby the courts below convicted and sentenced the accused are under challenge in these revision petitions.

3. Learned counsel for the revision petitioner mainly canvassed three points. Firstly, the courts below have not considered the contention that the blank signed cheques were issued to the complainant at the time of executing Ext.D2 agreement as security. Therefore, the cheques lack

consideration and a legally enforceable liability cannot be drawn under the disputed cheques. Secondly, according to the accused, the transaction with the bank is governed by Ext.D2 agreement. In that agreement, originally there was no clause enabling the complainant to proceed against the accused, in case failure to pay the balance amount due from the accused under the auction. Thirdly, an amount of Rs.80,300/- was due to the accused from the complainant bank and the said claim was raised in reply notice sent by the accused. When such an amount was due from the bank to the accused, there is no legally enforceable liability to the tune of Rs.1,72,500/-. In short, there is no legally enforceable debt of ₹1,72,500/- in view of the said claim of ₹80,300/- due to the accused.

4. Coming to the first contention, it is the specific case of the accused in defence that two signed blank cheques were handed over to the complainant, as a security enabling the 1st respondent to realise the amount due from the accused, at the time when both parties entered into Ext.D2

agreement pursuant to the confirmation of the auction in favour of the accused. I am of the opinion that even if the said contention is accepted as such, there is no illegality or impropriety in prosecuting the accused for the offence under Section 138 of the N.I.Act for the dishonour of the blank cheques, which were issued to complainant as security, for realisation of amount due from the petitioner. In **ICDS Ltd v. Beena Shabeer** (2002 (3) KLT 218), the Supreme Court held that there is no legal bar in presenting the cheque which was given as a security and prosecuting the accused for the dishonour of the said cheque. The above decision was followed in **Mohanachandran Nair v. P.C. Cherian** (2012 (4) KHC 96). So also, in **Lillikutty v. Lawrance** (2003 (3) KLT 721), this Court held that mere fact that payees name and amount shown are not in the handwriting of a drawer does not invalidate the cheque. In **Bhaskaran Nair v. Abdul Kareem** (2006 (4) KLT 48), this Court again held that defence that signed blank cheque was handed over by an account holder is suspicious one and must be approached with great care and caution, no account holder is expected to deal with the cheque in such a casual, careless, irresponsible and indifferent manner. In view of the above decisions, the first contention will stand rejected. In **Moideen v. Johny** [2006 (3) KLT SN 62 (C.No.85)], this Court held that the drawer by issuing a signed blank cheque conveys and implied authority to the payee to fill up the cheque for the required amount and present for encashment. The above view is further supported by the decision in **Vijender Singh v. Eicher Motors Ltd.** [2012 (1) KLT SN 28].

5. Secondly, it is contented that a clause enabling the complainant to proceed with legal action against the accused was unilaterally incorporated in Ext.D2 agreement without the consent of the accused. Originally, there was a clause enabling the complainant to cancel the auction and forfeiture the amount already deposited and retained with the complainant on failure of the payment of balance amount only. But the present complaint is instituted on the

basis of the said clause which is incorporated without the consent or knowledge of the accused. I am of the opinion that, for prosecuting an offence punishable under Section 138 of the Negotiable Instruments Act, in case, the cheque is dishonoured for want of funds, such a clause is neither necessary nor required in the agreement. Therefore, such an agreement whether executed unilaterally or bilaterally, it is inconsequential. No agreement can be entered into to prevent due process of law by the parties to the agreement either unilaterally or bilaterally. Therefore, the court below is justified in discarding the said contention raised on the basis of Ext.D2 agreement.

6. Coming to the third contention, according to the accused when ₹80,300/- was due to the accused as EMD and repair fee, there cannot be a legally enforceable debt to the tune of ₹1,72,500/- as claimed by the complainant.

7. Going by the reply notice sent by the accused, it is stated that he is entitled to get an amount of ₹20,000/- as security deposit and ₹60,300/- as repairing fee. Admittedly,

there is no evidence to show that the accused borrowed such an amount from the complainant either before the issuance of the cheque or before the dishonour of the cheque. But, it is also pertinent to note that even in the reply notice, there is no request to set off the said amount with the cheque amount and also there is no offer to pay the balance amount out of ₹1,72,500/- after adjusting ₹ 80,300/-. As far as an offence under Section 138 of the Negotiable Instruments Act is concerned, the prosecution is for dishonour of the cheque and the sole issue involved in the cheque is dishonhour of the cheque alone as the cause of action arises only on the dishonour of the cheque. It is also pertinent to note that those amounts are due under different heads, I am of the opinion that, even if such an amount is due to the accused unless any document is produced to show that both parties agreed to set off the said amount of ₹80,300/- with the claim of ₹1,72,500/-, the accused cannot be heard to say that ₹1,72,000/- is not a legally enforceable debt.

8. The question to be considered is, whether the accused has committed the offence by the dishonour of the cheque for want of sufficient funds. If a cheque is dishonoured for want of sufficient funds, necessarily prosecution under Section 138 of the N.I.Act will also follow. Here, the signature in the cheque and issuance of the cheque are not disputed. So, the burden is on the accused to rebut the presumption under Sections 139 and 118(a) of the N.I.Act. Here, the accused miserably failed to rebut the said presumptions which stood in favour of the complainant. Therefore, I find that the contention of the accused that an amount of ₹80,300/- was due to the accused at that time and thereby there cannot be a legally enforceable debt to the tune of ₹1,72,500/- is unsustainable in the absence of such an agreement or any material admitting the claim of ₹80,300/-. Thus, I find that there is no illegality or impropriety in the impugned judgments under challenge.

9. Coming to the sentence, substantive sentence of

simple imprisonment for one month will stand reduced and modified to simple imprisonment for one day till rising of the court. Provided that, the accused shall pay a compensation of ₹86,250/- each in both cases. 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 in both cases.

ii. The Revision Petitioner shall pay a compensation of Rs.86,250/- (Rupees Eighty Six thousand Two hundred and Fifty only) each to the complainant under Section 357(3) of the Cr.P.C, within a period of three months from today, in both cases.

iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 30th September, 2015 with sufficient proof to show payment of compensation, in both cases. Imprisonment for one day shall be concurrent, if the revision petitioner pays compensation in both cases, before the specified time.

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of one month, each in both cases and sentence shall not be concurrent.

The Criminal Revision Petition is allowed in part.

Sd/-
K.HARILAL, JUDGE.

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P.A to Judge