IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

Crl.Rev.Pet.No. 1266 of 2006 ( )

AGAINST THE JUDGMENT IN CRL.A 920/2005 of I ADDL. SESSIONS COURT, ERNAKULAM DATED 27-02-2006

AGAINST THE JUDGMENT IN ST 1613/2001 of J.M.F.C.,PERUMBAVOOR DATED 15-10-2005

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REVISION PETITIONER(S)/APPELLANT/ACCUSED::

ROBERT SCARIA, S/O. K.M. SCARIA,
KOLLAMPARAMBIL HOUSE, NEDUMKANDAM P.O., MINOR CITY,
IDUKKI DISTRICT.

BY ADV. SRI.PHILIP T.VARGHESE

RESPONDENT(S)/RESPONDENTS/COMPLAINANT::

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

2. M/S. FARMS INDIA CHICKEN,
   KODANAD, REPRESENTED BY ITS MANAGING PARTNER,
   SRI.T.S. PRAMOD.

R1 BY PUBLIC PROSECUTOR SMT.MADHU BEN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 09-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K.HARILAL, J.

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Crl.R.P. No.1266 of 2006

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Dated this the 9th day of October, 2015.

<u>O R D E R</u>

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.920/2005 on the files of the I 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 S.T.No.1613/2001 on the files of the Judicial First Class Magistrate's Court, Perumbavoor. According to the impugned judgment, the Revision Petitioner stands sentenced to undergo simple imprisonment for three months and to pay a compensation of Rs.2,51,000/- under Section 357(3) of the Cr.P.C. and in default to undergo simple imprisonment for 45 days.

2. The complainant's case is that the accused purchased broiler chicken from the complainant's concern and in that transaction an amount of Rs.2,50,000/- was due to the complainant from the accused and towards repayment of the said amount the accused had executed and issued Ext.P2 cheque for the said amount. When he presented the cheque for encashment, it was dishonoured and returned for want of sufficient funds. Though he caused to issue a lawyer's notice, the accused did not pay the cheque amount; but, sent a reply raising false contentions.

3. To prove the execution and issuance of the cheque, the power of attorney holder was examined as P.W.1 and Exts.P1 to P6 were marked. In defence, the accused contended that he had no transaction with the complainant firm. His father had business transactions with the complainant firm and in that transaction an amount of Rs.40,802/- was due to the complainant firm. Thereafter his father stopped the business with the complainant firm. While so, on 26.7.2000, the complainant and the three persons came to the

accused's shop by name 'Galathiya' and at that time his father was not present in the shop and he was there in the shop. The complainant and the persons came to create a tense situation in the shop and demanded Rs.40,802/-. In order to avoid a threatening situation, the accused gave Rs.20,802/- to the complainant by cash and they compelled him to issue cheque as security for the balance amount. When coercive attitude became intolerable, he was constrained to accept the demand and he went along with them to Nedunkandam Co-operative Bank to open a new account so as to get a cheque book enabling him to issue a blank signed cheque as security to the complainant. The accused deposited Rs.3,000/- in the bank and opened a new account and obtained a cheque leaf and that cheque was given to the complainant as a security after signing it. This cheque leaf was later misused for prosecuting the accused to get undue enrichment. After the issuance of the said blank signed cheque on 29.9.2000 an amount of Rs.5,000/- was given to the complainant by the father of the accused and there was a balance of Rs.18,000/- only due to the complainant from the accused. But the complainant, due to enmity towards him, fabricated the blank cheque and filed the present complaint.

4. After considering the evidence on record the courts below concurrently found that the complainant had successfully discharged the initial burden and thereby the presumptions under Section 139 and 118(a) of the N.I. Act would stand in favour of the complainant. What remains to be considered is, whether the accused had succeeded in rebutting the presumptions which stood in favour of the complainant.

5. The accused himself admitted that Ext.P2 cheque was drawn on the account maintained by him; but he contended that the said cheque was a blank signed cheque obtained by way of coercion and threat. He further contended that the complainant trespassed to his shop and caused a tense situation and thereafter brought him to the bank, opened and account and obtained Ext.P2 blank signed cheque as security.

Secondly, it was contended that the accused had no transaction with the complainant and his father had transaction with the complainant and in that transaction an amount of Rs.Rs.40,802/- was due from his father to the complainant. Thirdly, neither the accused nor his father had any transaction with the complainant in connection with chicken business and the transaction was with 'Selvan Broilers'.

6. As regards the denial of the accused's transaction with the complainant, it is seen that he himself had admitted that when the complainant trespassed to the shop room he was present in the shop room and to avoid a tense situation he gave Rs.20,802/- to the complainant by cash and for the balance amount he was constrained to issued Ext.P2 cheque as security, after opening a bank account at the instance of the complainant. Again he admitted that after the issuance of the cheque on 29.9.2000 an amount of Rs.5,000/- was given to the complainant by Demand Draft, out of the amount due to the complainant under Ext.P2 cheque. Thus, the accused himself admitted two

payments before and after the issuance of Ext.P2 cheque. In view of the above payments, it cannot be believed that the accused had no transaction with the complainant.

7. More importantly, the accused cannot escape from the liability under Section 138 on the N.I. Act, merely on the plea that he had no transaction with the complainant, so long as the issuance of Ext.P2 cheque stands admitted; particularly, when the person who has drawn and issued the cheque in discharge of the liability of a third party is also liable to be prosecuted for the offence under Section 138, if the cheque is dishonoured for want of sufficient funds. Therefore, to attract offence under Section 138 it need not be established that the accused had business transaction with the complainant. Hence the contention that he issued the cheque for and on behalf of the liability of his father as a security is of no consequence at all. Though the complainant was cross examined at length touching the transaction, nothing brought out to discredit his evidence. Therefore, it

could be inferred from the evidence of P.W.1 that the accused and his father had business transaction with the complainant and the amount was due to the complainant under that transaction, though Exts.D1 and D2 stands in the name of his father.

8. As regards the alleged threat and coercion, in obtaining Ext.P2 cheque, as rightly noted by the Appellate Court, from Exts.P5 and P6 it is clear that even prior to the date 26.7.2000 the accused had account with Nedumkandam Service Co-operative Bank. From Ext.P5 it could be seen that there is a withdrawal of Rs.2000/- from the bank on 3.8.2000 and as on the date of issuance of the cheque the balance amount outstanding in the account of the accused was only Rs.550/-. Even though the Bank Manager was examined as D.W.2, the accused miserably failed to bring out any circumstance which would show that the account was opened at the instance of the complainant and the cheque was obtained under coercion and threat, as security. So also, though it was contended that the Bank Manager refused to open the account and issue

the cheque and at last he was constrained to do so at the instance of the complainant, when he was cross examined, he was not confronted with such questions touching the said circumstances alleged by the accused during cross-examination. Thus, the accused miserably failed to rebut the presumptions which stood in favour of the complainant by adducing evidence to establish that the cheque was obtained by way of coercion or threat.

9. Even if the cheque was issued as a security towards discharge of a liability, such a cheque would also fall under the mischief of the offence under Section 138, in view of the decision held by the Supreme Court in I.C.D.S. Ltd. v. Beena Shabeer [2002 (3) KLT 218 (SC)]. In the above decision, the Apex Court held that the cheque which was issued as a security would also fall under the offence under Section 138 of the N.I. Act. The above view was followed in Mohanachandran Nair v. P.C. Cheriyan and Another [2012 (4) KHC 96] wherein this Court held that there is no legal bar in presenting a cheque which was given as a

security. That apart, in General Auto Sales v. Vijayalakshmi [2005(1) KLT 478] this Court held that even if a blank cheque had been given towards liability or even as security, when the liability is assessed and quantified, if the cheque is filled up and presented to the bank, the person who had drawn the cheque cannot avoid criminal liability arising out of Section 138.

10. The learned counsel for the petitioner contended that even though the complainant was required to produce the books of accounts evidencing the original transaction and he has accepted the same while examining, no document was produced before the courts below to prove the genuineness of the transaction which stands denied by the accused. Therefore, the courts below ought to have taken an adverse inference against the complainant.

11. As regards non-production of the books of accounts evidencing the original transaction, the legal position well settled by this Court in Johnson Scaria v. State of Kerala [2006 (4) KLT 290] is that in a prosecution under Section 138 of the N.I. Act, it is not

the burden of the complainant so long as the presumption under Section 139 stands, to plead, to prove and establish the original transaction/original consideration to discharge the liability in which the cheque is issued.

12. In short, the accused miserably failed to rebut the presumptions under Sections 139 and 118(a) of the N.I. Act which stood in favour of the complainant. Thus, all the contentions raised in this revision stand failed. There is no illegality or impropriety in any of the findings and I do not find any perversity in the appreciation of evidence.

This revision petition is devoid of merits and dismissed accordingly.

Sd/-
K. HARILAL, JUDGE

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