

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. 1292 of 2006 ()

**AGAINST THE ORDER IN CRA 341/2004 of ADDL.SESIONS COURT (ADHOC)-II,
KOZHIKODE DATED 23.12.2005**

**AGAINST THE ORDER/JUDGMENT IN CC 443/2002 of J.M.F.C.-I,THAMARASSERY
DATED 04.05.2004**

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

**C.V.JOHN, S/O VARGHEESE,
RESIDING AT CHAKKUMUTTIL HOUSE, CHEMBUKADAVU,
KODENCHERRY.**

**BY ADVS.SRI.V.V.SURENDRAN
SRI.P.A.HARISH**

RESPONDENT(S)/COMPLAINANT AND STATE:

- 1. GEORGE, S/O.CHACKO,
RESIDINT AT KOOVAPARA HOUSE,
THIRUVAMPADI AMSOM DESOM.**
- 2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.**

**R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS
R1 BY ADV. SMT.M.MANJU
R1 BY ADV. SRI.VINOD SINGH CHERIYAN**

**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. 1292 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.341/2004 on the files of the Additional District & Sessions Judge, Fast Track,(Ad-hoc-II) Kozhikode. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.443/2002 on the files of the Judicial First Class Magistrate's Court-II, Thamarassery. According to the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment till the rising of the court and to pay a compensation of Rs.50,000/- to PW1 under Section 357(3) of the Cr.P.C and in default, to undergo simple imprisonment for 2 months.

2. The complainant's case is that when he was in need of timber, pursuant to Ext.P1 agreement, he

entered into an agreement with the accused for the supply of timber. Ext.P1 agreement dated 22.01.2002 was executed between the parties in this regard and an amount of 50,000/- was advanced by the complainant to the accused. As per the said agreement, the accused had to supply the requisite timber at the price mentioned in Ext.P1 agreement. There was a condition in the agreement that the accused should obtain necessary cutting permission and valid pass for the supply of timber. When the accused failed to supply the timber, within the specified time, they entered into Ext.P2 agreement dated 23.3.2002, whereby the accused agreed to supply the timber on or before 30.4.2002 and in default, to pay an amount of ₹56,000/- to the complainant. Thereafter, on 25.03.2002, the accused met the complainant at the complainant's residence and expressed his inability to complete the contract and he expressed his readiness to issue a cheque for an amount of ₹50,000/- to the complainant for the discharge of the said liability. The complainant accepted the said proposal and he received Ext.P3 cheque dated 30.03.2002 for the discharge of

liability and the complainant issued a receipt for the same. Thereafter, on 29.3.2002, the accused met the complainant and requested him to postpone the presentation of the cheque till 22.8.2002, so as to arrange the money and the complainant agreed the same and he presented the cheque on 22.08.2002 only. But, the said cheque was dishonoured and returned for want of sufficient funds. Though he had caused to issue a lawyer's notice, the accused has not received the same and notice was returned with an endorsement "unclaimed". Thus, the accused has committed the offence punishable under Section 138 of the N.I.Act.

3. The specific case unfolded by the examination of DWs.1 to 4, by the accused, is that originally the cheque was dated 22.01.2002 and the complainant altered the date as 30.3.2002 enabling to present it for encashment within six months, without the consent of the accused. He admitted that he said cheque was issued in the form as that of Ext.P1 ie. filled up the pay order with the amount and signed and the same was issued as security when he received ₹50,000/- as advance

from the complainant.

4. It is the definite case of the accused that after Ext.P2 supplementary agreement, he has supplied timber for ₹1,07,000/- and when he demanded ₹57,000/- due from the complainant in that account, the complainant threatened him with a prosecution under Section 138 of the N.I.Act and ultimately that culminated in the present prosecution. In short, according to the accused, even though he received ₹50,000/- as advance, he discharged the said liability by way of supplying timber for ₹1,07,000/-. To substantiate the said contention, DWs.1 to 4 were examined. The main contention raised by the learned counsel for the petitioner is that the evidence of DW3 was not properly considered by the court below. In view of the above submission, I have meticulously considered the evidence of DW3. DW3 was purportedly examined to prove the supply of timber. But, according to DW3, he has not witnessed the alleged supply of timber, as contended by the accused. What is stated in his evidence is that he has shown timber along with the accused to the complainant and later, he came

to know from the accused that, he had supplied the timber logs to the complainant . In short, his evidence is hearsay evidence which cannot be admitted in evidence. Therefore, I find that even if the evidence of DW3 is taken at its face value, that does not improve the case of the accused.

5. Secondly, the learned counsel contended that Ext.P3 cheque was an invalid cheque due to the material alteration in the date of the cheque. Though, the learned Magistrate has allowed the application to send the cheque for expert's opinion, the learned Magistrate himself examined the cheque and found that the date of the cheque is not altered and the material alteration alleged by the accused is false.

6. Going by the order passed in CMP No.2882 allowing the application to send Ext.P3 cheque for expert's opinion, it could be seen that the order was passed on condition that the accused must pay the bata within 2 days. But the records shows that, the accused has not complied the said condition. Therefore, there is no substance in the argument that, even though the

application was allowed, the learned Magistrate has not sent Ext.P3 cheque for expert's opinion. In the above circumstance, the learned Magistrate himself examined the cheque with the aid of a magnifying glass and found that there is no alteration in the date of the cheque. The said conduct of the learned Magistrate is justified in view of Section 73 of the Indian Evidence Act particularly, when the accused has miserably failed to comply the condition in the order. I have examined Ext.P3 cheque with a view to find out whether there is any material alteration in the date of the cheque. I am of the considered opinion that, there is no material alteration in the date of the cheque and any ordinary prudent man with his own naked eye should realise the said fact and nobody can say that the date of the cheque is altered. Therefore, the said contention is unfounded and liable to be rejected at the threshold. No other point has been raised by the learned counsel for the petitioner.

7. The scope and extent of the revisional jurisdiction is very limited and confined to the examination of legality, propriety and correctness of the

findings of the court below. This court is not inclined to re-appreciate the entire evidence on records, unless any kind of perversity is pointed out. In the absence of any perversity, the court below is justified in finding that the evidence of DWS 1 to 3 is unreliable and the accused has miserably failed to rebut the presumptions under Sections 139 and 118 (a) of the Negotiable Instruments Act, which stood in favour of the complainant.

8. The learned counsel for the Revision Petitioner reiterated the contentions which were raised before the court 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.

9. The courts below had concurrently found that the 1st respondent had successfully discharged the initial burden of proving execution and issuance of the cheque; whereas the Revision Petitioner had failed to rebut the presumptions under Sections 118(a) and 139 of the N.I. Act which stood in favour of the 1st

respondent/complainant. So also, it is found that the debt due to the 1st respondent was a legally enforceable debt and Ext.P3 cheque was duly executed and issued in discharge of the said debt.

10. 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 sometime to pay the compensation as he is unable to raise the said amount forthwith due to paucity of funds.

11. 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.

12. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and the submission made at the Bar, seeking sometime to pay the compensation, I am inclined to grant 3 months time to pay the compensation. 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.50,000/- (Rupees Fifty thousand only) to the 1st respondent/complainant within a period of 3 months from today under Section 357(3) of the Cr.P.C.

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 2 months.

The Criminal Revision Petition is disposed of accordingly.

Sd/-
K.HARILAL,JUDGE

//TRUE COPY//

P.A. TO JUDGE

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