

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 11TH DAY OF MARCH 2015/20TH PHALGUNA, 1936

Crl.Rev.Pet.No. 506 of 2009 ()

**CRL.A 458/2007 of ADDL. SESSIONS COURT-II, MAVELIKKARA
CC 29/2007 of J.F.C.M. COURT-II, HARIPAD**

REVISION PETITIONER(S)/APPELLANT/COMPLAINANT::

**SAMUEL GEORGE @ SAMUEL,
VALIYAPARAMBIL, MANKAMKUZHY MURI, VETTIYAR VILLAGE
MAVELIKKARA.**

BY ADV. SMT.A.SALINI LAL

RESPONDENT(S)/RESPONDENT/ACCUSED::

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

**2. UDAYAKUMAR, MANJUNATH ILLOM,
CHUNAKARA NORTH, CHUNAKKARA VILLAGE.**

**R1 BY PUBLIC PROSECUTOR SMT. MADHU BEN M.
R2 BY ADV. SMT.ASHA ELIZABETH MATHEW**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11-03-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

OKB

K.HARILAL, J.

Crl.R.P. No.506 of 2009

Dated this the 11th day of March, 2015.

O R D E R

1. The revision petitioner is the accused in C.C.No.29/2007 on the files of the Judicial First Class Magistrate's Court-II, Haripad. He was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, the 'N.I. Act') on a complaint filed by the 2nd respondent herein. Though he preferred Crl.A.No.458/2007 before the II Additional Sessions Judge, Mavelikkara, the learned Sessions Judge also confirmed the conviction and sentence. Challenging the legality and propriety of the said findings, this revision petition is filed.
2. It is the case of the 2nd respondent that the accused borrowed an amount of Rs.2 lakhs on 24.1.2005 from the complainant and towards repayment, the accused issued a cheque dated 24.2.2005 for the said amount drawn on the Bank of Baroda, Mavelikkara Branch in favour of the complainant. When the cheque was presented for encashment, the same was dishonoured and returned for want of sufficient funds.

3. In defence, the revision petitioner contended that the 2nd respondent is a 'Benami' of one Samuel George, who has been conducting a chitty by name Kizhakkedathu Chitty Fund. The said Samuel George forcefully obtained a signed blank cheque from the revision petitioner with the help of then Special branch Circle Inspector of Police and fraudulently misused the same to prosecute the revision petitioner in retaliation of his enmity. But during cross examination he deposed that Ext.P1 cheque was one given by the accused to the said Samuel George in his capacity as a mediator for and on behalf of Gigimol and Sajimol in a money transaction with him.

4. To discharge the initial burden of proof the complainant himself was examined as P.W.1 and Exts.P1 to P7 were marked. The trial court, after considering the evidence of P.W.1, arrived at a finding that the complainant has successfully discharged his initial burden of proving the execution and issuance of Ext.P1 cheque and thereby the presumption under Sections 139 and 118(a) of the N.I. Act would stand in favour of the complainant. To rebut the said presumption, the accused had examined D.Ws.1 to 5. No documentary evidence had been produced in support of the defence contention. After considering the oral

evidence of D.Ws.1 to 5 the court below found that none of the witnesses support the defence case put forward by the accused. Going by the judgment passed by the trial court, I do not find any perversity in the appreciation of oral evidence given by D.Ws.1 to 5. The learned Additional Sessions Judge also, after reappreciating the oral evidence of D.Ws.1 to 5, concurred with the findings of the trial court. In the absence of any perversity this Court is not inclined to reappreciate the oral evidence of the witnesses under revisional jurisdiction.

5. Going by the impugned judgment it is seen that though the accused had raised a contention that the complainant is a 'Benami' of one Samuel George and Ext.P1 was obtained by force at the instance of the Special Branch Circle Inspector of police, no evidence had been adduced to substantiate the said contention. It is pertinent to note that had the cheque been taken away by force, certainly the accused could have filed a complaint against the said police officer. That apart, the accused had not filed any stop memo to the bank alleging the fraudulent manner of obtaining Ext.P1 cheque from his possession. Admittedly, though the accused had received notice signed by the complainant, he did not send any reply denying the liability

claimed under the cheque. Only in the year 2006 after the institution of the present complaint the accused has filed a C.M.P. before the court against the 2nd respondent/complainant including the said Samuel George and several other persons.

All the aforesaid points are unequivocally pointing towards the lack of bona fides in the contentions raised in defence. There is no illegality or impropriety in any of the findings in the impugned judgment and I do not find any perversity in the appreciation of evidence. Consequently, the conviction entered against the revision petitioner under Section 138 of the N.I Act will stand confirmed.

6. Coming to the sentence, it is seen that the trial court sentenced the revision petitioner to undergo simple imprisonment for three months and to pay a compensation of Rs.2 lakhs to the complainant under Section 357(3) of the Cr.P.C. and in default to undergo simple imprisonment for three months more. In this revision petition, it is also contended that the sentence imposed on the revision petitioner is excessive, harsh and disproportionate with the nature and gravity of the offence punishable under Section 138 of the N.I. Act.

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.

8. In view of the above decisions, I am of the opinion that the sentence imposed on the revision petitioner is a little harsh and excessive. 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. He shall pay a compensation of Rs.2,00,000/- (Rupees two lakhs only) to the 2nd respondent/complainant

within a period of one month from today.

iii. He shall appear before the trial court to suffer substantive sentence of simple imprisonment as ordered above on or before 10.4.2015 with sufficient proof to show payment of compensation.

iv. In default, he shall undergo simple imprisonment for a period of three months.

This Revision Petition is disposed of accordingly.

Sd/-
(K.HARILAL, JUDGE)

okb.