IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

Crl.Rev.Pet.No. 30 of 2012 ()

AGAINST THE JUDGMENT IN CRA 265/2010 of ADDL. DISTRICT COURT (ADHOC - I), KALPETTA DATED 15-11-2011

AGAINST THE JUDGMENT IN ST 2420/2006 of J.M.F.C.,SULTHANBATHERY DATED 22-10-2010

REVISION PETITIONER(S):

VINOD KUMAR AGED 53 YEARS
S/O.DAVIDSON, MOOLAYIL HOUSE, MAITHANIKUNNU
SALUTHAN BATHERY

BY ADV. SRI.MATHEW KURIAKOSE

RESPONDENT(S):

1. M/S.DHANASHILPI FINANCE & HIRE PURCHASE(P) LTD
REP.BY ITS AUTHORISED REPRESENTATIVE
SRI.P.M.BALAKRISHNAN,
S/O.MADHAVAN, WORKING AS A MANAGER OF THE COMPANY
NEERCHAL HOUSE, AMBALAVAYAL, SULATHAN BATHERY 673 592

2. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM - 682 031

R1 BY ADV. SRI.GEORGE SEBASTIAN
R2 BY PUBLIC PROSECUTOR SRI. R. GITHESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

B. SUDHEENDRA KUMAR, J.

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Crl.R.P. No. 30 of 2012

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Dated this the 2nd day of November, 2015.

ORDER

The revision petitioner is the accused in S.T. 2420 of 2006 on the files of the Court of the Judicial magistrate of First Class - I, Sulthan Bathery.

2. The trial Court convicted the revision petitioner under Section 138 of N.I.Act and sentenced him thereunder to simple imprisonment for three months and to pay compensation of ₹ 70,000/- to the complainant under Section 357 (3) Cr.P.C. In the appeal, the conviction was confirmed and the sentence was modified and reduced to imprisonment till the rising of the court and to pay a compensation of Rs. 70,000/- to the complainant under Section 357 (3) Cr.P.C. Aggrieved by the said conviction and sentence, this Revision Petition has been filed.

3. Heard.

4. The prosecution allegation is that towards the discharge of the liability of the complainant, the revision petitioner issued Ext. P2 cheque in favour of the complainant. The complainant presented the said cheque for encashment. However, the same was dishonoured due to insufficiency of funds in the account of the revision petitioner. Statutory notice was issued which was received by the revision petitioner. However, the revision petitioner did not pay the cheque amount within the statutory period or thereafter.

5. Before the trial court, PW1 was examined and Exts. P1 to P7 were marked for the complainant. DW1 and DW2 were examined and Exts.D1 to D10 were marked for the revision petitioner.

6. PW1 is the accountant of the complainant, who had given evidence re-iterating the contentions in the complaint.

7. The learned counsel for the revision petitioner has argued that eventhough the revision petitioner had a contention that the revision petitioner did not execute Ext. P2 cheque as contended by PW1, the complainant did not incline to produce the details of the loan transaction to prove the transaction between the complainant and the revision petitioner and in the said circumstances, the conviction and sentence passed by the courts below cannot be sustained. The learned counsel for the first respondent, on the other hand, relying on the decision of the Apex Court in Vasanthakumar v. Vijayakumari [2015 (2) KLT 99]= [2015 (1) KLD 887], argued that since the cheque as well as the signature had been accepted by the revision petitioner, the presumption under Sec. 139 of the N.I.Act could be available in favour of the complainant and in the said circumstances, the courts below were correct in convicting the revision petitioner under Section 138 of the N.I.Act.

8. In Vasanthakumar (supra), the Apex Court held that during May, 2006, the accused sought for a loan of Rs. 5,00,000/- from the complainant for releasing a movie and the loan was advanced by the complainant. The accused promised to re-pay the loan as and when the said movie was released. However, the accused failed to re-pay the loan amount. Ultimately, the accused issued cheque for Rs. 5 lakhs on 16-1-2007. The cheque was dishonoured when presented for encashment with the endorsement "stop payment". Statutory notice was returned with the endorsement "absent-information delivered". The accused contended that the accused had given the cheque in question during the year 1999 as security against a loan of Rs. 5,00.000/- taken then. After the accused paid the loan, the complainant did not return the said cheque saying that he had misplaced the same. Thereafter, the case was filed. In such circumstances, the Apex Court said that since the cheque as

well as the signature had been accepted by the accused, the presumption under Sec. 139 of the N.I.Act is available in favour of the complainant.

9. The facts in Vasanthakumar (supra) would show that it was a personal transaction between the accused and the complainant. The facts of the said case are different from the facts in this case. In this case, the complaint is silent with regard to the transaction involved in this case. The complaint is also silent about the amount borrowed by the revision petitioner from the complainant or the date on which the amount was borrowed. An affidavit was filed, in lieu of the examination-in-chief of PW1. It was stated therein that the revision petitioner borrowed Rs. 44,000/- from the complainant as a personal loan and since the revision petitioner did not re-pay the said amount, a total amount of Rs. 59,162/-, including interest, was due to the complainant from the revision petitioner. The revision petitioner

had a contention that the revision petitioner had availed a loan from the complainant and at the time of availing the loan, the revision petitioner issued a blank signed cheque to the complainant and the said cheque had been misutilised by the complainant to file the present complaint. It is true that the revision petitioner had different contentions at different stages. However, the sum and substance of the contentions of the revision petitioner is that a blank signed cheque entrusted by the revision petitioner with the complainant had been misutilised by the complainant to file the present complaint. According to him, he availed a loan and out of the said loan, some amount was re-paid. PW1 stated that the account details of the revision petitioner are available with the complainant. PW1, further stated that the interest charged was 24%. However, no material is available before the Court to show as to how the amount covered by Ext. P1 cheque was due to the complainant from the revision petitioner as on the date of Ext. P1 cheque. The revision petitioner had a contention that one of the staff members of the complainant, namely, Lakshmi had written everything in Ext. P1 cheque. To support the said contention, DW1 was examined. DW1 admitted that she had filled up Ext. P1 cheque. However, she stated that she filled up the same at the house of the revision petitioner on the request of the revision petitioner, being a family friend of the revision petitioner. However, DW1 admitted that the revision petitioner is an educated person. Other family members in the house were also educated people. DW1 was not able to state as to why DW1 was requested to fill up Ext. P1 cheque at the house of the revision petitioner. The evidence of DW1 would show that DW1 is an employee of the sister concern of the complainant. However, at the latter portion of her cross-examination, she admitted that the sister-concern and the complainant had the same owner. She also admitted that the pass book of the complainant Company was filled up in her handwriting. Having gone through the evidence of DW1, it is not possible to believe that DW1 had filled up Ext. P1 cheque at the residence of the accused on the request of the accused, particularly when DW1 was the employee of the same owner. PW1 admitted that the records relating to the transactions in this case are available with PW1. PW1 further stated that the amount covered by Exts. D1 and D2 series was paid by the revision petitioner. He further stated that the said amount was deducted while writing the amount in Ext. P1 cheque. The evidence of PW1 would further show that the amount borrowed by the revision petitioner was only Rs. 44,000/-. The evidence of PW1 would also show that some amount was repaid by the revision petitioner. Even then, the amount shown in Ext. P1 cheque is Rs. 59,162/-. It is not discernible as to how the amount covered by Ext. P1 cheque was due to the complainant as on the date of the cheque. Eventhough the revision petitioner had a contention that the revision petitioner had no transaction at all with the complainant as alleged in this case, the complainant did not incline to produce the details of the transaction between the complainant and the revision petitioner to prove the case of the complainant. The revision petitioner had a further contention that the revision petitioner issued a blank signed cheque in connection with a different transaction and the said cheque had been misutilised by the complainant to file the present complaint, eventhough the revision petitioner had paid substantial amount.

10. It is not discernible as to why the details of the account with regard to the transaction of the revision petitioner with the complainant were not produced before the Court by the complainant eventhough the revision petitioner had taken the above contention. In view of the evidence of PW1 and DW1 as

discussed above, it is not necessary to discuss the evidence of DW2. Having gone through the relevant inputs as discussed above, I am of the view that the evidence of PW1 is not at all sufficient to prove the execution of Ext. P2 cheque by the revision petitioner. In the said circumstances, the courts below went wrong in appreciating the evidence and reaching the conclusion that the revision petitioner executed Ext. P2 cheuqe as contemplated under Section 138 of the N.I.Act.

11. The learned counsel for the first respondent, in the course of argument, has requested for remanding the matter, for granting an opportunity to the complainant to prove the documents relating to the transaction between the complainant and the accused. It appears from the records that the complainant had sufficient opportunity to produce the documents pertaining to the transaction. Even then, the revision petitioner did not produce any such document. The

learned counsel for the revision petitioner submitted that if opportunity is granted to the complainant to produce documents pertaining to the transaction, there is every likelihood that the complainant will create documents and produce the same before the court as if they were the documents relating to the transaction between the complainant and the revision petitioner. It is well settled law that remand should not be made to enable the complainant to adduce evidence to fill up the lacuna. For the said reason, I am not inclined to grant the prayer of the learned counsel for the first respondent in this regard.

In the result, the revision stands allowed setting aside the conviction and sentence passed by the courts below under Sec. 138 of the N.I.Act and the revision petitioner is acquitted for the offence under Section 138 of the N.I.Act. The bail bond of the revision petitioner stands cancelled and he is set at liberty.

I make it clear that the revision petitioner is entitled to reimburse of the amount, if any, deposited by the revision petitioner before the trial court in connection with this case on filing application before the trial court in this regard.

Dated this the 2nd day of November, 2015.

B. SUDHEENDRA KUMAR,
JUDGE.

Ani/3/11/2015.