IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 4TH DAY OF MARCH 2015/13TH PHALGUNA, 1936

Crl.Rev.Pet.No. 2035 of 2004 ( )

AGAINST THE JUDGMENT IN CRL. APPEAL 624/2000 of
III ADDL. SESSIONS COURT, THRISSUR, DATED 29-04-2003
&
AGAINST THE JUDGMENT IN ST 2496/1998 of J.M.F.C.-III,
THRISSUR, DATED 30-11-2000

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

RAVINDRAN, S/o. NARAYANAN,
KALLATTUPARAMBIL HOUSE, KOZHUKULLY VILLAGE,
MOORKKANIKKARA DESOM, THRISSUR TALUK,
THRISSUR DISTRICT.

BY ADVS.SRI.P.G.SURESH
SRI.G.SUDHEER (THURAVOOR)
SRI.RAJAN VISHNURAJ
SRI.V.HARISH

RESPONDENT(S)/COMPLAINANT & STATE:
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1. K.K.PANKAJAKSHAN, S/o. KRISHNAN,
KAIPPULLIVEETTIL HOUSE, VALLANIKKARA,
THRISSUR DISTRICT.

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

R1 BY ADVS. SRI.V.V.RAJA
SRI.M.T.SURESHKUMAR

R2 BY PUBLIC PROSECUTOR SMT. V.H. JASMINE.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K. RAMAKRISHNAN, J.

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Crl. R. P.No.2035 of 2004

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Dated this the 4th day of March, 2015

O R D E R

Accused in S.T.No.2496/1998 on the file of the Judicial First Class Magistrate Court-III, Thrissur, is the revision petitioner herein. The case was taken on file on the basis of a private complaint, filed by the first respondent against the petitioner alleging offence under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, revision petitioner had agreed to sell his property and an amount of ₹40,000/- was given as advance and later he did not execute the document, but agreed to return the amount and the amount payable including the interest was fixed at ₹80,000/- and in discharge of that liability, he had issued Ext.P1 series two cheques, one for ₹60,000/- and other for ₹20,000/- with date 10.11.1997 and 10.12.1997 respectively. The

cheques when presented were dishonoured for the reason ‘funds insufficient’ vide Ext.P2 dishonour memo, and the same was intimated to the complainant by his banker vide Ext.P3 intimation letter. The complainant issued Ext.P4 notice vide Ext.P5 postal receipt and the same was returned with endorsement 'unclaimed' by the addressee. The revision petitioner had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the revision petitioner appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, the complainant himself was examined as PW1 and Exts.P1 to P7 were marked on his side. After closure of the complainant's evidence, the revision petitioner was questioned under Section 313 of the Code of Criminal

Procedure and he denied all the incriminating circumstances brought against him in the complainant's evidence. He had further stated that, he had issued two cheques, but though the amount was paid, the cheques were not returned. In order to prove his case, the revision petitioner himself was examined as DW1, but no documents were produced on his side. After considering the evidence on record, the trial court found that the revision petitioner had committed the offence punishable under Section 138 of the Negotiable Instruments Act and convicted him thereunder and sentenced him to undergo simple imprisonment for three months and also to pay a compensation of ₹40,000/-, in default to undergo simple imprisonment for three months more under Section 357(3) of the Code of Criminal Procedure. Aggrieved by the same, he filed Crl. Appeal No.624/2000 before the Sessions Court, Thrissur, which was made over to Third Additional Sessions Court, Thrissur, for disposal and the learned Additional Sessions Judge allowed the appeal in part, confirming the order of conviction, but reduced the substantive sentence to simple imprisonment for one month, but enhanced the compensation to ₹1,00,000/-, in default to undergo simple imprisonment for one month. Aggrieved by the same, the present revision has been filed by the revision petitioner/ accused before the court below.

4. Heard the counsel for the revision petitioner, first respondent and learned Public Prosecutor.

5. The counsel for the revision petitioner submitted that, a perusal of Ext.P1 series cheques will go to show that it was not executed as claimed by the complainant and the blank signed cheques given were mis-used. Further the court below had not properly appreciated the evidence of DW1. Even according to the complainant, the original consideration was only

₹40,000/-, but the appellate court had enhanced the compensation to ₹1,00,000/-, which is unsustainable in law. So according to him, the courts below were not justified in convicting the revision petitioner for the offence alleged and even if the conviction is proper, in the alternate he had submitted that, the sentence imposed is harsh.

6. On the other hand, the counsel for the first respondent submitted that, PW1 was not cross examined and the appellate court had given reasons for enhancement of the compensation amount, especially when court has got power to impose sentence, double the cheque amount as fine. So there is no illegality committed by the courts below in passing the order.

7. The case of the complainant in the complaint was that, there was a property transaction between the complainant and the revision petitioner, in which he had paid ₹40,000/- as advance, but that was not

materialised and the revision petitioner had agreed to return the advance amount with interest which was quantified at ₹80,000/- and in discharge of that liability he had issued Ext.P1 series cheques for ₹60,000/- and ₹20,000/- respectively. The fact that, the cheques were presented for collection and the same was returned with endorsement 'funds insufficient' is proved by the evidence of PW1 and Exts.P2 and P3 along with Ext.P7, the account extract of the revision petitioner maintained in the bank. Further, notice issued was returned with endorsement 'unclaimed'. The revision petitioner when examined as DW1, had no case that he will not be served with notice in that address. On the other hand, he had admitted that, he had received the intimation, in spite of that he had not claimed the notice as well. So under the circumstances, court below was perfectly justified in coming to the conclusion that the notice issued was proper.

8. As regards the contention of the revision petitioner is concerned, when PW1 was examined, he was not cross examined. No attempt was made to recall PW1 also, if the non-cross examination of PW1 was due to some reasons known to the accused or his counsel. That shows that, he had nothing to say about the case put forward by the complainant, when he was examined in chief.

9. Further the case of the revision petitioner was that, there was civil case pending, which was settled for ₹40,000/- and for discharging that liability he had issued two cheques, though he paid the amount, the cheques were not returned and mis-using the cheques, the present case was filed. But he had admitted his evidence and there is no document to prove that compromise or payment of the amount as claimed by him. So under the circumstances, courts below were perfectly justified in coming to the conclusion that, the

revision petitioner had failed to prove discharge pleaded by him. If the amount is paid as advance in respect of the property transaction and if it is not materialised, parties are at liberty to fix the amount payable on failure to comply with the terms of the agreement. In this case, the evidence of PW1 was that the amount was quantified including the interest at ₹80,000/- and these two cheques were issued in discharge of that liability which was not challenged by cross examining PW1. So under the circumstances, it cannot be said that, the cheques were issued not in discharge of a legally enforcible debt as contended by the counsel for the revision petitioner. Further the complainant had no case that these cheques were filled in the handwriting of the revision petitioner. He had only stated that, these cheques were delivered in discharge of his liability. So in the absence of challenge of the evidence given by PW1 regarding the issuance of the cheque, the submission made by the counsel for the revision petitioner that, the cheques were not issued in discharge of his liability, as no legs to stand. So the courts below were perfectly justified in coming to the conclusion that the revision petitioner had committed the offence punishable under Section 138 of the Negotiable Instruments Act and the concurrent findings of the court below on this aspect do not call for any interference.

10. As regards the sentence is concerned, the trial court had sentenced him to undergo simple imprisonment for three months and also to pay a compensation of ₹40,000/-, in default to undergo simple imprisonment for three months more under Section 357(3) of the Code of Criminal Procedure. If the amount is realised, the same be paid to PW1 as compensation. The appellate court had reduced the substantive sentence to one month and enhanced the compensation to ₹1,00,000/- with default sentence of one month. The appellate court had given reason for enhancement of the

compensation amount, as the cheques were issued in the year 1997 and even in 2004, the amount was not paid. So under the circumstances, the appellate court felt that, in order to reduce the substantive sentence, compensation has to be increased and ultimately raised the compensation to ₹1,00,000/- with default sentence of one month imprisonment. But having enhanced the compensation to ₹1,00,000/-, the court below should have reduced the substantive sentence to bare minimum, in view of the dictum laid down in the decisions reported in **Damodar S. Prabhu v. Sayed Babalal H. [JT 2010 (4) (S.C.)457]** and also in **Kaushalya Devi Massand v. Roopkishore [AIR 2011 (SC) 2566]**. So considering the circumstances, this court feels that, substantive sentence of one month imprisonment imposed by the court below appears to be harsh, while retaining the compensation fixed by the appellate court, the substantive sentence can be reduced to imprisonment till rising of the court and that will meet the ends of justice. So the sentence imposed by the court below and modified by the appellate court as regards the substantive sentence alone is set aside and the same is modified as follows:

> The revision petitioner is sentenced to undergo imprisonment till rising of the court and also to pay a compensation of ₹1,00,000/- to the complainant, in default to undergo simple imprisonment for one month under Section 357(3) of the Code of Criminal Procedure. If the petitioner had already undergone any imprisonment in execution of the conviction entered by the courts below, then the petitioner need not undergo the substantive sentence of imprisonment till rising of the court, but he need only to pay the compensation directed by this court. The counsel for the revision petitioner

prayed some time for payment of the amount. Considering the amount involved, this court feels that, three months time can be granted to the revision petitioner to pay the amount, till then, the execution of sentence is directed to be kept in abeyance.

With the above modification of the sentence alone, the revision petition is allowed in part and disposed of accordingly. Office is directed to communicate this order to the court below, immediately.

Sd/-
K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge

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