

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

CrI.Rev.Pet.No. 1757 of 2006

CrI.A 92/2005 of I ADDL. SESSIONS COURT, THRISSUR

CC 862/2002 of J.M.F.C.-I, THRISSUR

REVISION PETITIONER/ACCUSED::

THANKAPPAN, S/O. ARUMUGHAN,
AGED 52 YEARS, OFFICE STAFF, SREE ASOKA TEXTILES
ASOKAPURAM, ALUVA.

BY ADV. SRI.S.RAJEEV

RESPONDENTS/COMPLAINANT & STATE::

1. M. SREEDHARAN, S/O. KRISHNANKUTTY,
MEDATH HOUSE, P.O. PALLISSERY, PALAKKAD
THRISSUR.

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

R1 BY ADV. SRI.G.SREEKUMAR (CHELUR)

R2 BY PUBLIC PROSECUTOR SRI.JIBU.P.THOMAS.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 21-07-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

STU

K.HARILAL, J.

=====

Crl.R.P.No. 1757 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.92/2005 on the files of the I Additional Sessions Judge, Thrissur. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.862/2002 on the files of the Judicial First Class Magistrate's Court-I, Thrissur. According to the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment for three months and to pay a compensation of ₹25,000/- to the complainant and in default, to simple imprisonment for two

months.

2. The complainant's case is that the accused and the complainant are workers in a Textile Mill by name "Asoka Textiles" at Aluva and they were residing at company quarters and thereby well known to each other. On 06/01/2002, the accused borrowed an amount of Rs.3,00,000/- from the complainant at his residence for personal purpose of the accused and in discharge of the said liability, on the same day itself, he had issued Ext.P1 cheque for an amount of Rs.3,00,000/- to the complainant. When the complainant presented the cheque for encashment, the same was dishonoured and returned with a memo 'Refer to drawer'. Though he had caused to issue a lawyer's notice, the accused did not pay the cheque amount but sent a reply stating false contentions to discharge the initial burden of proving execution and issuance of the cheque.

3. The complainant was examined as PW1 and Exts.P1 to P9 were marked. After evaluating the said

evidence, the courts below concurrently found that the complainant has discharged the initial burden of proving execution and issuance of the cheque and thereby the presumptions under Sections 139 and 118(a) of the Negotiable Instruments Act would stand in favour of the complainant.

4. In defence, the accused put forward a case that no amount was due from the accused to the complainant under the said cheque. It is contended that the complainant was a foreman of of private chitti and the accused was a subscriber in that chitti. The chitti amount was received by the accused from the complainant on 9.10.2001 and at that time, the complainant obtained two signed cheque leaves and two blank signed papers. Though the accused paid the said amount in February, 2002, the cheque leaves and the signed blank papers were not returned back. The complainant agreed to return the said papers on the next day by representing that those papers were kept in his house. But, in spite of the repeated demands, he has not

returned the papers and the signed cheque leaves were misused for prosecuting the accused. Thus, there is no consideration for the said cheque.

5. The learned counsel for the petitioner contends that the complainant has not proved his sources of income and the appellate court has failed to discharge the jurisdiction and power vested in it by not considering the evidence of DWs. 1 and 2 in its correct perspective. This is the sum and substance of the arguments advanced by the learned counsel for the petitioner.

6. Per contra, the learned counsel for the 1st respondent contended that when the complainant was cross-examined by asking questions touching the sources of income, the complainant has explained his sources of income to the satisfaction of the trial court. So also it is contended that the evidence of DWs 1 and 2 are mutually destructive and unreliable.

7. The question to be considered is, whether the accused has succeeded in rebutting the presumptions under

Sections 139 and 118(a) of the N.I.Act which stood in favour of the complainant. The learned counsel for the accused contended that the complainant has not proved the sources of income. But, going by the defence contention, it could be seen that the accused himself admitted that in addition to his employment in the textile factory, the complainant is a foreman of the chitti. That apart, when the complainant was examined in cross examination, he has deposed that in addition to his employment, he is conducting a provisional store near his house. It follows that it was brought out in evidence that the complainant has various sources of income. Besides in a proceedings under Section 138 of the N.I.Act, the complainant is not expected to prove his sources of income to lend money as a cause of action arises on the dishonour of the cheque only for want of sufficient funds. Secondly, the learned counsel for the revision petitioner contended that the appellate court has not considered the evidence of DWs.1 and 2 in its correct perspective. But, going by the judgment passed by the trial

court, it could be seen that the learned Magistrate meticulously considered the evidence of DWs.1 and 2 and found that their evidence is mutually destructive, unreliable and untrustworthy. The learned Magistrate has given sufficient reasoning for the said conclusion. The discrepancies are specifically stated. This Court is not inclined to re-appreciate the entire evidence on record unless it is found that the appreciation of evidence is vitiated by perversity. I do not find any kind of perversity in the appreciation of the evidence of DWs.1 and 2. Therefore, the contention raised by the learned counsel for the accused would stand rejected. There is no illegality or impropriety in any of the findings whereby the court below found that the accused miserably failed to rebut the presumptions under the N.I.Act. I do not find any reason to interfere with the verdict guilty. Hence, the conviction would stand confirmed.

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

courts 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. The Revision Petitioner failed to point out any kind of perversity in the appreciation of evidence or illegality or impropriety in the findings whereby the trial court convicted him.

9. The courts below had concurrently found that the complainant/1st respondent had successfully discharged initial burden of proving execution and issuance of the cheque; whereas the Revision Petitioner had failed to rebut the presumption under Section 118(a) and 139 of the N.I. Act which stood in favour of the 1st respondent. So also, it is found that the debt due to the 1st respondent was a legally enforceable debt and Ext.P1 cheque was duly executed and issued in discharge of the said debt.

10. This Court is satisfied that the courts below had meticulously evaluated the evidence on record. I do not

find any kind of illegality or impropriety in the said findings or perversity in appreciation of evidence, from which the above findings had been arrived. Therefore, I am not inclined to re-appreciate entire evidence once again and I confirm the concurrent findings of conviction.

11. 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 some time to pay the compensation as he is unable to raise the said amount forthwith due to paucity of funds.

12. Similarly, the substantive sentence imposed on the revision petitioner is too harsh and excessive. So also, the sentence imposed on the revision petitioner is against the directions in the judgment rendered by the Apex Court in various decisions. The learned Magistrate has not given any reason to reduce the compensation to an amount lesser than the cheque amount. The learned counsel for the

revision petitioner prayed for setting aside the sentence of imprisonment also. If the revision petitioner is incarcerated for a period as ordered by the courts below, the entire family will put in great hardship.

13. 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.

14. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and submission made at the Bar, seeking time to pay

compensation, I am inclined to grant three months time to pay the compensation. Similarly, the substantive sentence of imprisonment is reduced and modified to simple imprisonment for one day till rising of the court. Consequently, in supersession of the sentence imposed by the trial court and modified 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. The Revision Petitioner shall pay a compensation of Rs.3,00,000/- (Rupees Three Lakhs only) to the 1st respondent within a period of three months from today. If the petitioner had deposited any amount in the trial court in compliance with the interim order of this Court or appellate court, the same shall be given credit to and the balance alone needs to be paid as compensation.

iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 21st October, 2015 with

sufficient proof to show payment of compensation .

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of three months.

The Criminal Revision Petition is disposed of accordingly.

Sd/-
K.HARILAL, JUDGE.

stu

//True copy//

P.A to Judge