

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

Crl.Rev.Pet.No. 1381 of 2007 ()

AGAINST THE JUDGMENT IN CRL.A 62/2004 of II ADDL.SESIONS
COURT, KOLLAM DATED 06-12-2006

AGAINST THE JUDGMENT IN ST 1121/2000 of J.F.C.M.COURT -I,
KOTTARAKARA DATED 27-01-2004

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REVISION PETITIONER(S)/APPELLANT/ACCUSED:

KHALID, AGED 57 YEARS, S/O. MOIDEENKANNU,
CHARUVILA VEEDU, NEDUMPANA.

BY ADV.SRI.K.P.SUJESHKUMAR

RESPONDENT(S)/RESPONDENTS/STATE & COMPLAINANT:

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

2. THE SECRETARY,
GRAMA PANCHAYAT, KOTTARAKKARA.

R1 BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB
R2 BY ADV.SRI.C.J. JOY

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 20-08-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

OKB

K.HARILAL, J.

Crl.R.P. No.1381 of 2007

Dated this the 20th day of August, 2015.

O R D E R

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.62/04 on the files of the II Additional Sessions Judge, Kollam. The above appeal was filed challenging the judgment, whereby the revision petitioner was found guilty of the said offence, passed in S.T.No.1121/2000 on the files of the Judicial First Class Magistrate's Court-I, Kottarakara. According to the impugned judgment, the revision petitioner stands sentenced to undergo simple imprisonment for six months and to pay a compensation of Rs.5,91,740/- to the complainant and

in default, to undergo simple imprisonment for a further period of one month.

2. The complainant is the Secretary of Kottarakara Grama Panchayat and the accused is a meat contractor, who has bid meat stalls of the Kottarakara market for the year 1997-98 in auction. The complainant's case is that towards the discharge of an earlier debt to the Panchayat, the accused had drawn and issued a cheque for Rs.5,91,740/- to the complainant and when the complainant presented the said cheque for encashment, the same was dishonoured and returned for want of sufficient funds. In spite of receipt of notice the accused did not pay the cheque amount nor did he send a reply denying the liability under the cheque.

3. To discharge the initial burden, the complainant was examined as P.W.1 and Exts.P1 to P6 were marked. On an appraisal of the aforesaid evidence the courts below concurrently found that the complainant successfully discharged the initial burden to prove execution and issuance of the cheque

and thereby the presumptions under Sections 139 and 118(a) of the N.I. Act would stand in favour of the complainant. I do not find any reason to interfere with the said finding.

4. To rebut the presumption, the accused contended that a blank signed cheque was issued by way of security to the Panchayat, when he participated in the auction conducted by the Panchayat and the said cheque was manipulated by the complainant to file the present complaint. The learned counsel for the petitioner vehemently contended that the courts below concurrently failed to consider the question whether the complainant has discharged the initial burden to prove execution and issuance of the cheque. According to the learned counsel, absolutely there is no evidence to prove the original transaction, the alleged auction, under which the liability said to have been accrued. Therefore, the question of rebutting the presumption would not come into play so long as the accused failed to discharge the initial burden.

5. At the outset, it is pertinent to note that the

complainant is the Secretary of Kottarakara Grama Panchayat. The payee to whom Ext.P1 cheque had been drawn itself shows that it was not a personal transaction and it was a transaction with the Panchayat. The accused himself admitted that he participated in the aforesaid auction and he has given Ext.P1 cheque as a blank signed cheque to the complainant as a security. As regards the initial burden, the scope and extent of the initial burden of the complainant in a prosecution under Section 138 of the N.I. Act was considered by this Court in Johnson Scaria v. State of Kerala [2006 (4) KLT 290] and it was held that it is not the burden of the complainant in every case, so long as presumption under Section 139 stands, to plead, to prove and establish the original transaction/original consideration to discharge the liability in which the cheque is issued. In the light of the above decision, I find that the contention that either in the original complaint or in evidence the complainant has not disclosed the particulars of the original transaction and is unsustainable.

6. More importantly, in a prosecution under Section 138 of the N.I. Act, the cause of action arises only on the dishonour of the cheque and it would be completed on the failure to pay the cheque amount within 15 days from the date of receipt of the lawyer notice. It is to be remembered there the presumptions under Sections 139 and 118(a) are incorporated in the N.I. Act to give credibility and reliability on the cheque itself. It is pertinent to note that when P.W.1 was cross examined in the court, he has narrated the particulars of the transaction in answer to the questions asked by the counsel for the accused. I am of the opinion that it is sufficient to prove the execution and issuance of the cheque in addition to the presumption under Sections 139 and 118(a) of the N.I. Act.

7. Coming to the rebuttal evidence, it is the case of the accused that the cheque was issued as a security when he participated in the auction conducted by the complainant. It is pertinent to note that he did not mount the witness box so as to swear to the

circumstances under which he was compelled to issue a signed blank cheque as asserted by him during the cross examination of P.W. 1 and the same is fatal to the case of the accused. More over, he kept mum in spite of the receipt of the lawyer's notice, which contains threat of criminal prosecution and demand of an amount of Rs.5,91,740/-. In Yohannan v. Sabu [2012 (3) KLT SN 31], this Court held that the failure to send a reply does not tantamount to proof of execution of cheque or give rise to a presumption that the defence set up by the accused should be disbelieved in toto; but the very strong circumstance which goes against the accused is that he has not disputed the demand. He has not offered any explanation regarding such a strange conduct. An ordinary prudent man, while placed in such a circumstance, which the petitioner says he was, is certainly unlikely to remain inactive, silent, dumb and mute. In the above view of the matter, I find that the accused failed to rebut the presumption which stood in favour of the complainant.

8. The scope and extent of revisional jurisdiction

is very limited and confined to examination of legality, propriety and correctness of the findings, whereby the courts below arrived at a decision. There is no scope for re-appreciation of evidence, unless the findings are found perverse. Even if two views are possible, this Court cannot substitute its own view replacing the concurrent views of the courts below.

9. The courts below had concurrently found that the complainant/2nd 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 2nd respondent. So also, it is found that the debt due to the 2nd respondent was a legally enforceable debt and Ext.Pl cheque was duly executed and issued in discharge of the said debt. 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.

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 Sec.138 of the N.I. Act. The substantive sentence of imprisonment imposed on the revision petitioner is too harsh and excessive. The learned counsel further sought for some time to pay the compensation, if this revision is found meritless, as he is unable to raise the said amount forthwith due to paucity of funds.

12. 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 v. Baby (2011(4) KLT 355), the 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.

13. 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 the 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, this Revision

Petition is liable to be 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 Rs.5,91,740/- (Rupees Five lakhs ninety one thousand seven hundred and forty only) to the 2nd respondent as compensation within a period of three months from today.

iii. The revision petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 20.11.2015 with sufficient proof to show payment of compensation.

iv. In default, the revision petitioner shall undergo simple imprisonment for a period of one month.

v. If the revision petitioner had deposited any amount in the trial court, in compliance with the direction of this Court or appellate court, that amount shall be given credit to and the balance alone need be paid as compensation. In that event, the 2nd respondent/complainant is allowed to realise such deposit, if any.

The Criminal Revision Petition is disposed of accordingly.

okb.

Sd/-
K. HARILAL, JUDGE