

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

Crl.Rev.Pet.No. 2291 of 2006 ()

CRL.A 138/2004 of ADDL. SESSIONS JUDGE, FAST TRACK (ADHOC-I),
ALAPPUZHA

CC 266/2003 of J.M.F.C.-II (MOBILE), ALAPPUZHA

REVISION PETITIONER/APPELLANT/ACCUSED::

A.J. JOHN, S/O. JOSEPH,
ANJILIPPARAMBIL, VATTAYAL, THIRUVAMPADY P.O.
ALAPPUZHA.

BY ADVS.SRI.R.BINDU (SASTHAMANGALAM)
SRI.M.P.PRASANTH

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE::

1. P.C. MATHAI, S/O. CHACKO,
PORIYAMVELIL, POOMKAVU, ALAPPUZHA.

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

R1 BY ADVS. SRI.N.RAGHURAJ
SMT.K.AMMINIKUTTY

R2 BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 22-07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K.HARILAL, J.

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Crl.R.P.No.2291 of 2006

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Dated this the 22nd day of July, 2015

ORDER

The revision petitioner is the accused in C.C.No.266/2003 on the files of the Judicial First Class Magistrate's Court-II (Mobile), Alappuzha. He was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act on a complaint filed by the 1st respondent herein. After considering the evidence on record, the learned Magistrate found the revision petitioner guilty of the said offence and convicted thereunder. He was sentenced to undergo simple imprisonment for three months and to pay a compensation of ₹20,000/- to the complainant under Section 357(3) of the Code of Criminal Procedure and in default, to undergo simple imprisonment for a further period of three months. He is also ordered to pay ₹2,000/- to the complainant, which, if not paid, the

accused shall undergo simple imprisonment for a further period of 15 days under Section 359 of the Cr.P.C. Though he had preferred Crl.Appeal No.138/2004 before the Additional Sessions Court, Fast Track (Adhoc I), Alappuzha, after re-appreciating the evidence on record, the learned Sessions Judge also concurred with the findings of conviction but modified the sentence. The substantive sentence of simple imprisonment for three months was reduced and modified to simple imprisonment for one day till rising of the court and to pay a compensation of ₹ 25,000/- to the complainant and in default, to undergo simple imprisonment for two months. The concurrent findings of conviction and sentence are under challenge in this revision petition.

2. The complainant's case is that the complainant and the accused are known to each other and they had several financial transactions. In discharge of the liability, the accused issued Ext.P1 cheque dated 15.3.2003 for ₹20,000/- to the complainant and when he presented the said cheque

for encashment, the same was dishonoured and returned for want of sufficient funds. Though he caused to issue a lawyer's notice, the accused has not paid the cheque amount in response to the demand made by the complainant. Thus he has committed the offence punishable under Section 138 of the N.I.Act.

3. To discharge the initial burden of proving execution and issuance of the cheque, the complainant was examined as PW1 and Exts.P1 to P6 were marked. After considering the oral evidence of the complainant and the documents marked through him, the court below arrived at a finding that the complainant has successfully discharged the initial burden of proof and thereby the presumption under Sections 139 and 118(a) of the N.I.Act, which would stand in favour of the complainant.

4. In defence, one witness was examined as DW1 and Exts.D1 and D2 were marked. The accused contended that he had not borrowed the amount as stated by the complainant. According to him, in the year 1998, he

borrowed ₹15,000/- from the complainant and he executed a sale deed with respect to his property in favour of the complainant as security. Thereafter, the complainant had re-conveyed the said property to him on payment of consideration. But, at that time, for the execution of the conveyance deed, as a security, he has handed over Ext.P1 cheque to the scribe of the document to be executed by name Majeed and he handed over Ext.P1 cheque to the complainant. Even though he has paid the full consideration of the re-conveyance, Ext.P1 cheque was not returned and the same is misused for prosecuting him. To substantiate the said contention, the said Majeed was examined as DW1 and one receipt dated 7.11.2001 was marked as Ext.D1. But, Ext.D1 was marked through PW1. During his examination, he admitted that Ext.D1 receipt was issued by him.

5. The learned counsel for the petitioner drew my attention to the oral evidence of the complainant and Ext.D1 receipt and contended that there cannot be a

transaction and issuance of the cheque as on 15.10.2002 as contended by the complainant. Thus, the complainant miserably failed to discharge the initial burden of proving execution and issuance of the cheque. Unless execution and issuance of the cheque is proved beyond doubt, a rebuttal evidence need not be considered.

6. Going by the oral evidence of the complainant as PW1, it is seen that, the complainant himself admitted that the accused borrowed an amount of ₹20,000/- on 15.10.2002 and on the same day itself, he had issued Ext.P1 cheque for ₹20,000/- dated 15.3.2003 to him. Though there is a correction in the number of cheques, the complainant himself admitted that that correction was made by him and the signature shown near the correction is his signature. Going by Ext.D1 receipt and Ext.P1 cheque, undoubtedly, it is seen that the number of cheque is same. So Ext.P1 cheque is seen referred to in Ext.D1 receipt dated 7.11.2001. It follows that Ext.P1 cheque was issued on a day before 7.11.2001. If that be so, no reliance can be placed

on the case of the complainant that on 15.10.2002 that the accused borrowed an amount of ₹20,000/- from him and on the same day, he had issued Ext.P1 cheque in discharge of the said liability. Going by the trial court judgment, it could be seen that the learned Magistrate had noticed this grave discrepancy in the evidence of the complainant; but the learned Magistrate has discarded the same and went on to the rebuttal evidence. In short, the said improbability as regards the borrowal and issuance of the cheque had been passed over to silence, I am of the opinion that the accused had succeeded in proving the improbability of the complainant's case with the standard of preponderance of probability by the cross-examination of the complainant and the production of Ext.D1 receipt. As observed by the trial court, there may have several transactions and Ext.P1 cheque might have been used as a security for earlier transactions with the complainant also and Ext.D1 receipt might have been one issued at an earlier occasion. But, no clarification to that effect was brought out in re-

examination. Needless to say, the complainant miserably failed to discharge initial burden of proving execution and issuance of the cheque beyond doubt.

7. In the above analysis, I find that the court below concurrently went wrong in appreciating the evidence. The appreciation of evidence is vitiated by perversity. In the result, the conviction and sentence imposed on the revision petitioner will stand set aside and the accused is acquitted of the offence under Section 138 of the N.I.Act. If the petitioner had deposited any amount in compliance with the interim direction of this Court or the appellate court, he is allowed to realise the said amount from the trial court.

The revision petition is allowed.

Sd/-
K.HARILAL, JUDGE.

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P.A to Judge