

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

Crl.Rev.Pet.No. 3274 of 2004

AGAINST THE JUDGMENT IN CRL.A.NO. 31/2003 of ADDITIONAL
SESSIONS COURT (ADHOC)-II, THODUPUZHA.

AGAINST THE JUDGMENT IN ST 757/1996 of J.M.F.C.,
KATTAPPANA.

REVISION PETITIONER:

V.V.ALIAS, KATTAPPANA MEDICAL SUPPLIES,
KATTAPPANA.

BY ADVS.SRI.VARGHESE C.KURIAKOSE
SRI.JACOB SEBASTIAN
SRI.PRAVEEN K. JOY

RESPONDENTS:

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

2. DR.JOSEPH MATHEW,
MERCY HOSPITAL, ERATTAYAR, KATTAPPANA.

R1 BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB
R2 BY ADV. SRI.S.KRISHNAMOORTHY
BY ADV. SMT.SNEHA ROSE

THIS CRIMINAL REVISION PETITION HAVING BEEN
FINALLY HEARD 11/06/2015, THE COURT ON 19-08-2015,
PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No. 3274 of 2004

Dated this the 19th day of August, 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.31 of 2003 on the files of the Additional Sessions Judge (Adhoc-II), Thodupuzha. The above appeal was filed challenging the judgment whereby the Revision Petitioner was found guilty of the said offence, passed in S.T.No.757 of 1996 on the files of the Judicial First Class Magistrate's Court, Kattappana. According to the impugned judgment,

the Revision Petitioner stands sentenced to undergo simple imprisonment for three months under Sec.138 of the N.I. Act. He is also directed to pay Rs.12,500/- as compensation to P.W.1 under Sec.357(3) of the Cr.P.C. In default of payment of compensation, to undergo simple imprisonment for 15 days.

2. The complainant's case, in brief, is as follows: He is running a hospital by name 'Mercy Hospital' at Erattayar and the accused is conducting a medical shop at Kattappana and both of them are friends. On 2/8/1991, the accused borrowed an amount of Rs.24,500/- as loan from the complainant and subsequently towards the repayment of the said amount, he issued three cheques for Rs.5,000/-, Rs.7,500/- and Rs.12,000/- respectively to the complainant and when he presented the cheques for Rs.5000/- and Rs.7,500/- for encashment, the same was dishonoured for want of sufficient funds. Though he had caused to issue a lawyer's notice demanding the cheque amount, the accused neither paid the

cheque amount nor send a reply denying the liability. Thus he has committed the offence alleged against him.

3. In defence, the accused contended that no amount had been borrowed from the complainant as alleged by him; but he admitted the issuance of Exts.P1 and P2 cheques. He put forward an alternative contention that one Sankara Panicker was a Pharmacist at his medical shop and a case numbered as S.T.No.94/91 was pending before the Ambalapuzha Magistrate's Court between P.W.1 and the said Sankara Panicker. Sankara Panicker asked the accused to mediate in the dispute, and thereupon, the accused, Sankara Panicker and one Dr. Raju Philip went to the hospital of P.W.1 and as per the mediation, Ext.D1 agreement was executed and as per the terms of that settlement, three cheques for Rs.5,000/-, Rs.7,500/- and Rs.12,000/- respectively were issued to the complainant as security for the amount due from Sankara Panicker to the

complainant. Later on 3/8/1991 the complainant came to his shop and demanded that the entire amount should be paid forthwith and in that circumstance, he approached D.W.3, his brother-in-law and borrowed Rs.25,000/- from him and paid Rs.24,500/- to the complainant. When he demanded to return of the cheques and the agreement, the complainant said that the same would be entrusted to Dr. Raju Philip. Earlier, the accused was acquitted after trial, and when the matter came up before this Court, this Court remanded the matter with a view to enabling the accused to adduce further evidence to establish discharge as contended by the accused.

4. To discharge the burden, D.Ws.1 to 3 were examined. The short question to be considered is, whether the accused has succeeded in discharging the burden by the evidence of D.Ws.1 to 3? As rightly observed by the court below, the plea of discharge, as put forward by the accused, is not supported by any documentary evidence. When the accused relies on

Ext.D1 agreement to establish the circumstances under which he issued the cheque. Absolutely there is no satisfactory explanation as to the reasons under which he discharged the liability without obtaining documentary evidence to show payment of money, particularly when the complainant was in possession of his cheques. In the above analysis, prima facie, it does not appear to be believe that the accused would have paid the entire amount without obtaining any document for the same, as observed by the court below. The explanation that the complainant told him that the cheques and agreement would be entrusted to Dr. Raju Philip cannot be believed. This finding gets assurance from the fact that when P.W.1 was examined, not even a single suggestion was put to him in his cross-examination in this regard. Further, it is pertinent to note that the accused himself admitted that when such payment was effected, the case against Sankara Panicker was pending before the Ambalapuzha Magistrate's Court. If that be so, what

prompted him to make such a payment without withdrawing the said case, as agreed in Ext.D1 agreement. Moreover, admittedly, the accused has not sent a reply notice stating all these contentions on receipt of the lawyer's notice demanding the said amount with the threat of criminal prosecution.

5. In Yohannan v. Sabu [2012 (3) KLT SN 31 (C.No.32)], the Court held that failure to send a reply does not tantamount to proof of execution of the cheque or give rise to a presumption that the defence set up by the accused should be disbelieved in toto; but it is a very strong circumstance which goes against the accused and the inference is that he is not disputing the demand. An ordinary prudent mind place in such a circumstance, which the petitioner says he was, is certainly unlikely to remain inactive, silent, dumb and mute. The learned counsel for the revision petitioner contended that the complainant realised the amount from Sankara Panicker in execution of the sentence imposed against him. Even

if it is so, such realisation of the amount from Sankara Panicker is of no consequence at all, particularly when the complainant denied the execution of Ext.D1 agreement and the accused relies on discharge. So long as the payment of cheque as security for the amount due from Sankara Panicker remains as not proved beyond doubt, such realisation of the amount from Sankara Panicker cannot be taken into consideration to disbelieve the evidence of P.W.1, particularly when the accused relies on the plea of discharge only during the course of trial.

6. On an appraisal of the complainant's evidence, the court below concurrently found that the complainant successfully discharged the initial burden to prove execution and issuance of the cheque. In this analysis the court below is justified in finding that the accused has miserably failed to rebut the presumptions under Secs.118(a) and 139 of the N.I. Act which stood in favour of the complainant. I do not find any perversity in the appreciation of evidence

from which those findings are arrived at.

7. 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.

8. In the light of the above decisions, I find that the substantive sentence imposed on the petitioner is excessive and disproportionate with the nature and gravity of the offence. Consequently, the substantive sentence of simple imprisonment for three months will

stand reduced and modified to simple imprisonment for one day till rising of the court and the petitioner is given two months time to pay the compensation.

Hence the accused 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 ₹12,500/- (Rupees Twelve thousand and five hundred only) to the 2nd respondent/ complainant as compensation under Sec.357 (3) of the Cr.P.C. within a period of two 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 19/10/2015 with sufficient proof to show payment of compensation.

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of 15 months.

v. If he had deposited any amount in the trial court towards compensation or fine, the same shall be given credit to and the balance alone needs to be paid as compensation or fine, as the case may be, and in that event, the complainant is allowed to realise such deposit from the court.

The Criminal Revision Petition is disposed of accordingly.

Sd/-
(K. HARILAL, JUDGE)

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P.S. to Judge