

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. 3126 of 2006 (A)

AGAINST THE JUDGMENT IN CRL.A 357/2005 of FIRST ADDITIONAL SESSIONS
COURT, KOZHIKODE DATED 24.4.2006

AGAINST THE JUDGMENT IN CC 646/2003 of J.M.F.C.-III, KOZHIKODE
DATED 12.4.2005

REVISION PETITIONER/APPELLANT/ACCUSED:

K.SHANMUGHAN, AGED 50 YEARS,
S/O. KRISHNA PILLAI, PROPRIETOR, ABHINAYA FILMS,
DEEPIKA COTTAGE, METTUPALAYAM STREET,
PALAKKAD-678 001.

BY ADV. SMT.P.K.RADHIKA

RESPONDENTS/RESPONDENTS/COMPLAINANT:

1. I.PRASHOBKUMAR, AGED 27 YEARS,
S/O. PRASANNA KUMAR, PROPRIETOR, AMRUTHESWARI FILMS,
S.K.TEMPLE ROAD, KOZHIKODE-673 001.

2. STATE OF KERALA REPRESENTED BY
ITS PUBLIC PROSECUTOR, KOZHIKODE.

R2 BY PUBLIC PROSECUTOR SRI. RAJESH VIJAYAN

R1 BY ADV. SMT.C.G.PREETHA

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

Crl.Rev.Pet.No. 3126 of 2006 (A)

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE-A1 TRUE COPY OF THE JUDGMENT IN C.C.NO.354/2003.

/TRUE COPY/

P.S TO JUDGE

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K. RAMAKRISHNAN, J.

.....
Crl.R.P.No.3126 of 2006
.....

Dated this the 4th day of March, 2015.

O R D E R

The accused in C.C.No.646/2003 on the file of the Judicial First Class Magistrate Court-III, Kozhikode is the revision petitioner herein.

2. The case was taken on file on the basis of a private complaint filed by the first respondent against the petitioner alleging an offence under section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act' for short). The case of the complainant in the complaint was that the revision petitioner was having film distribution business with the complainant and in that relationship, he had borrowed a sum of ₹5 lakhs and the matter was settled through Association, in which he had paid ₹ 10,000/- and agreed to pay ₹ 4,50,000/- and thereafter he issued Ext.P1 cheque for the said amount, when the amount was demanded. The cheque when presented was dishonoured for the reason 'funds insufficient' evidenced by Ext.P3 dishonour memo and that was intimated to the complainant by Ext.P4 intimation letter. The complainant issued

ExtP5 notice dated 9.7.2003 on the same day vide Ext.P5(a) postal receipt and the same was received by the revision petitioner evidenced by Ext.P5(b) postal acknowledgment and the revision petitioner had sent Ext.P6 reply notice. The revision petitioner had not paid the amount. So he had committed the offence punishable under section 138 of the Act and hence the complaint.

3. When the revision petitioner appeared before the court below, particulars of the 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 PW2 and the Bank Manager was examined as PW1. Exts.P1 to P8, P5 (a), P5(b), P7(a) and P7(b) were marked on his side. After closure of the complainant's evidence, the accused 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 filed a statement stating that he had no transaction with the complainant and no cheque has been issued to the complainant. Further he had stated that he had issued three blank signed cheques to the father of the complainant and misusing one of

those cheques, the present complaint was filed. In order to prove the case of the revision petitioner, he himself was examined as Dw1 and Exts.D1 and D2 were marked on his side. After considering the evidence on record, the court below found him guilty under section 138 of the Act and convicted him thereunder and sentenced him to undergo simple imprisonment for six months and also to pay a sum of ₹4,50,000/- as compensation to the complainant, in default to undergo simple imprisonment for three months under section 357(3) of the Code. Aggrieved by the same, the revision petitioner filed Crl.A.No.357/2005 before the Sessions Court, Kozhikode which was made over to the First Additional Sessions Court, Kozhikode and the learned Additional Sessions Judge by the impugned judgment allowed the appeal in part confirming the direction to pay compensation and enhanced the default sentence to six months but reduced the substantive sentence imprisonment till the rising of court. Aggrieved by the same, the present revision has been filed.

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

5. The learned counsel for the revision petitioner

submitted that the petitioner had sent reply to the notice issued, in which he had detailed the circumstances under which the cheque had come to the hands of the complainant and how it was misused. Further, he himself has gone to the witness box and explained the circumstances, but the courts below have not properly appreciated the same. Further, he had filed Crl.M.A.No.3160/2007 for receiving additional evidence before this Court and the judgment produced along with that petition will go to show that another cheque mentioned in the reply notice was misused by the complainant's father and a complaint was filed through one Jayand and after evidence, that case was ended in acquittal disbelieving the case of the complainant in that case and that will prove the case of the revision petitioner. The learned counsel for the revision petitioner prayed for allowing the revision.

6. On the other hand, the counsel appearing for the first respondent submitted that the courts below have properly appreciated the evidence and earlier notice sent was not replied and it is after the receipt of that notice that the present cheque was given. Further Ext.P8 letter will go to show that they have known to each other as well. So the concurrent

findings of the court below do not call for any interference.

7. Heard the Public Prosecutor also.

8. The case of the complainant in the complaint was that the revision petitioner had issued Ext.P1 cheque in discharge of his liability for the amount due from him. The case of the revision petitioner was one of total denial.

9. It is true that in cases where execution and delivery of the cheque and transactions were denied, the burden is on the complainant to prove the same. Further in the decision reported in **Hiten P. Dalal v. Bratindranath Banerjee** (2001 KHC 1310) relied on by the counsel for the revision petitioner, it has been observed that:

“.....it is obligatory on the part of the court to presume the liability of the drawer for the amount of the cheque in every case where the factual basis for such presumption is established. Such presumption can be rebutted by the drawer by proving on evidence that the holder of the cheque had not received the same towards the discharge of any liability. Such rebuttal does not have to be conclusively established. The court must either believe the defence to exist or consider its existence to be reasonably probable. But mere explanation given by the drawer, although plausible, held, would not

suffice”.

10. In order to prove the case of the complainant, complainant himself was examined as PW2 and he deposed in support of his case. He had stated that he had raised the amount by the amount given by his mother and father by selling their property and the amount was given to the revision petitioner on three occasions. It is true that he had not produced any document to prove that fact. But, when the revision petitioner was examined as DW1, he had admitted that he had received Ext.P7 notice sent by the complainant demanding the amount mentioned in the notice but he did not send any reply to the same. He had also admitted Ext.P8 letter given by him that it was given in his letter head to the complainant. But his case was that one of the blank signed documents obtained by the father of the complainant has been misused and this document was created. It is true that he had issued a reply notice. But, except sending reply notice, he had not taken any steps against the father of the complainant or against the complainant for misusing his documents. Further, if really there was no transaction between the complainant and the revision petitioner, he would have sent reply to Ext.P7 notice. The document now

sought to be relied on by the counsel for the revision petitioner produced along with Crl.M.A.No.3160/2007 is a photostat copy of the judgment in C.C.No.354/2003 filed by one Jayand against the present revision petitioner alleging the offence under section 138 of the Act misusing one of the cheques said to have been given by him to the father of the complainant and on the basis of the evidence, that case was ended in acquittal. First of all, it is a photostat copy which is inadmissible in evidence. Secondly, even if that judgment is there that can only be relied for the purpose of proving that a complaint was filed by Jayand and that ended in acquittal. That finding is not binding on this Court which was decided by that court on the basis of evidence available in that case. Each cases will have to be considered by the court on the basis of the evidence produced in that case and not relying on the evidence or finding in another case which was rendered not between the same parties as well. So the document which is sought to be relied on by the counsel for the petitioner produced along with Crl.M.A.No.3160/2007 has no relevance and it does not have evidentiary value under sections 41 to 43 of the Evidence Act. The evidence of DW1 also will go to show that he had no

documents to prove the transaction with the father of the complainant and himself. Further he had also admitted that the film distribution company of which the petitioner claims to be the owner was also one of the companies dealing with film distribution. So it cannot be said that he had no capacity to raise the amount and pay the amount as well. So under the circumstances and on the basis of the evidence available on records, the courts below were perfectly justified in coming to the conclusion that the defence set up by the revision petitioner has not been established by him and the complainant had proved his case and the amount covered by the cheque has not been paid in spite of notice issued and thereby he had committed the offence punishable under section 138 of the Act and the concurrent findings of the courts below on this aspect do not call for any interference.

11. As regards the sentence is concerned, the trial court had sentenced the revision petitioner to undergo simple imprisonment for six months and also to pay the cheque amount of ₹4,50,000/- as compensation to the complainant, in default to undergo simple imprisonment for three months under section 357(3) of the Code. The appellate court had confirmed the

direction to pay compensation but reduced the substantive sentence imprisonment till the rising of court and enhanced the default sentence to six months from three months for non payment of the compensation. Maximum leniency has been shown by the appellate court in imposing the sentence which cannot be said to be excessive or harsh.

12. While this Court was about to dispose of the case, the counsel for the revision petitioner prayed for six months time for payment of the amount. Though the case is of the year 2003, considering the amount involved, this Court feels that five months time can be granted to the revision petitioner to pay the amount. So the revision petitioner is granted time till 4.8.2015 to pay the amount. Till then, execution of the sentence is directed to be kept in abeyance.

With the above directions and observations, the revision petition is dismissed.

Office is directed to communicate a copy of this order to the concerned court immediately.

Sd/-
K. RAMAKRISHNAN, JUDGE.

cl

/true copy/

P.S to Judge

