IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937

Crl.Rev.Pet.No. 2584 of 2007 ( )

AGAINST THE JUDGMENT IN CRL.A 566/2006 of V ADDL.SESSIONS COURT, ERNAKULAM DATED 13-04-2007

AGAINST THE JUDGMENT IN CC 2794/2002 of J.M.F.C.-I, ALUVA DATED 24-06-2006

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REVISION PETITIONER(S)/APPELLANT/ACCUSED:

K.V.JOHNY, KIZHAKKEKUDIYIL HOUSE,
KOKKAPPILLY, THIRUVANKULAM.

BY ADV. SRI.A.T.ANILKUMAR

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:
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1. M/S.JANATHA TRADING CORPORATION,
REP. BY ITS MANAGING PARTNER, P.O.JOSE, MARKET ROAD, ALUVA.

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

R1 BY ADV. SRI.M.P.ASHOK KUMAR
R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K.HARILAL, J.

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Crl.R.P. No.2584 of 2007

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Dated this the 21st 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.566/2006 on the files of the V Additional Sessions Judge, Ernakulam. The above appeal was filed challenging the judgment, whereby the Revision Petitioner was found guilty of the said offence, passed in C.C.No.2794/2002 on the files of the Judicial First Class Magistrate's Court-I, Aluva. According to the impugned judgment, the Revision Petitioner stands sentenced to undergo simple imprisonment for six months and to pay a compensation of Rs.3 lakhs to the complainant and in default, to undergo simple imprisonment for six months.

2. The case of the complainant is that, the complainant firm is a wholesale-cum-retail dealer of cement at Aluva and the accused had purchased cement from the complainant firm on various occasions and owed an amount of Rs.3 lakhs to him. Towards the discharge of the said liability he issued Ext.P1 cheque for the said amount. When the complainant presented the cheque for encashment in the bank, it was dishonoured and returned for want of sufficient funds. In response to the notice under Section 138(b) issued by the complainant, the accused sent a reply stating false contentions; but he has not paid the cheque amount. Thus, the accused committed the offence under Section 138 of the N.I. Act.

3. To discharge the initial burden, the complainant was examined as P.W.1 and Exts.P1 to P11 were marked. On appraisal of the evidence the courts below concurrently found that the complainant successfully discharged the initial burden. I do not find any reason to interfere with the said finding.

4. In defence, the accused pleaded not guilty and denied the liability. According to him, his business

ceased to exist from 1.4.2002 onwards and blank cheques were given to the complainant as security when he used to purchase cements from the complainant firm and that one of those cheques was misused for prosecuting him frivolously.

5. The scope and extent of jurisdiction of the revisional court is limited and confined to examination of the legality, propriety and correctness of the findings, whereby the courts below had arrived at a finding on the matter in issue involved in the case. There is no scope for re-appreciation of entire evidence unless any kind of perversity is pointed out.

6. With this yardstick, I have scrutinised the impugned judgment under challenge and heard the learned counsel for the revision petitioner in detail. The learned counsel for the revision petitioner pointed out that the accused had sent a letter to the Sales Tax Authority to intimate that he had stopped business from 1.4.2002. Though the said letter and other records were obtained from the Sales Tax Department, the same was not marked for the purpose of proving the defence contention. Secondly, the claim

of the complainant is not supported by material documents like bill books, delivery notes, etc. Thirdly, Exts.D1 to D3 are the documents inadmissible in evidence under law, but the same were marked in contravention to Section 65(b) of the Indian Evidence Act.

6. Coming to the first contention, the point to be considered is, whether the letter said to have been sent by the accused to the Sales Tax Authority has any relevancy or significance in deciding the matter in issue involved in a prosecution under Section 138 of the N.I. Act. It is to be remembered that in a prosecution under Section 138 of the N.I. Act, the cause of action arises on the dishonour of the cheque and becomes complete, when the accused fails to pay the cheque amount within the time specified in the notice under Section 138(b) of the N.I. Act. In Johnson Scaria v. State of Kerala [2006 (4) KLT 290], this Court held that it is not the burden of the complainant in every case, so long as the presumption under Section 139 stands, to plead, to prove and to establish the original transaction/original consideration to discharge the

liability in which the cheque is issued. Therefore, I am of the opinion that, had that letter sent to the Sales Tax Authority been produced and marked, that would not have any legal consequence or relevancy at all in the issue involved in a prosecution under Section 138 of the N.I. Act. Even if the letter alleged to have been sent to the Sales Tax Authority was produced in evidence, no inference as regards non-existence of the disputed transaction could have been drawn from that letter.

7. Coming to the second point, going by the impugned judgment, it is seen that the complainant has produced Exts.P1, P9 & P11 Stock Registers and Ext.P10 Sales Register, Ext.D1 Day Book and Ext.D2 ledger account of the accused. After comparing of the entries in Exts.P10 Sales Register & P11 Stock Register with D1 Day Book and D2 Ledger Account of the complainant, the learned Sessions Judge has specifically observed that the entities in Exts.P10 & P11 tally with that of D1 and D2. As rightly held by the Appellate Court, if the documents produced by the complainant show the genuineness of the transaction, the complainant

cannot be found fault with for not producing the bill books, which were made in use four years back. I do not find any reason to interfere with the said finding.

8. Coming to the challenge against the acceptability of Exts.D1 and D3, as rightly observed by the Appellate Court, after having produced the documents at the instance of the accused, he cannot be made to raise a contention challenging the acceptability of those documents in appeal for the first time, particularly, when he has not raised any objection against the marking of those documents before the trial court. Therefore, I reject the challenge against the admissibility of Exts.D1 and D3.

9. The petitioner himself admitted that he had business transactions with the complainant and during the course of such transaction he had handed over Ext.P1 cheque in a signed blank form as a security for the purchase effected by him. If the transactions were made on payment of ready cash, no occasion could be arisen for tendering a signed blank cheque as security. Thus, the admitted case of the complainant itself shows that he purchased goods under credit facility

given by the complainant. If that be so, in view of the decision in I.C.D.S. Ltd. v. Beena Shabeer [2002 (3) KLT 218 (SC)], the cheque given as a security for credit purchase also would fall under the mischief of the offence under Section 138 of the N.I. Act. The courts below appreciated the evidence in its correct perspective and reached at a proper finding that the accused has committed the offence punishable under Section 138 of the N.I. Act. There is no illegality or impropriety in the above finding and I do not find any perversity in the appreciation of evidence from which those findings have been arrived at. Hence the conviction stands confirmed.

10. The revision petitioner submitted that the sentence imposed on the revision petitioner is excessive and disproportionate with the nature and gravity of the offence under Section 138 of the N.I. Act.

11. 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], 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.

12. In view of the above decisions, I find that the sentence imposed on the revision petitioner is excessive and disproportionate with the nature and gravity of the offence. Consequently, the substantive sentence of simple imprisonment for six months will stand reduced and modified to simple imprisonment for one day till rising of the court and the revision petitioner is given five months time to pay the compensation. 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) He shall pay a compensation of Rs.3,00,000/- (Rupees Three lakhs only) to the complainant within a period of five months from today under Section 357(3) of the Cr.P.C.

(iii) He shall appear before the trial court to suffer the aforesaid sentence on or before 21.1.2016 with sufficient proof to show payment of compensation.

(iv) In default, he shall undergo simple imprisonment for three months.

(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 1st respondent/complainant is allowed to realise such deposit, if any.

The criminal revision petition is disposed of.

Sd/-
K. HARILAL, JUDGE

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