IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 27TH DAY OF FEBRUARY 2015/8TH PHALGUNA, 1936

Crl.Rev.Pet.No. 462 of 2011 ( )

AGAINST THE JUDGMENT IN Crl. APPEAL 1080/2007 of ADDL.DISTRICT AND SESSIONS COURT, FAST TRACK (ADHOC) - IV, THIRUVANANTHAPURAM, DATED 29-11-2010

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AGAINST THE JUDGMENT IN CC 174/2005 of JMFC-V, THIRUVANANTHAPURAM (SPL.COURT FOR MARKLIST CASES), DATED 12-12-2007

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

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S.SHAJI, S/O.SIVAN, CHUNAYARA VEEDU,
SASTHAVATTOM, KATTAYIKONAM.P.O, THIRUVANANTHAPURAM.

BY ADV. SRI.BIJU BALAKRISHNAN

RESPONDENT(S)/COMPLAIANANT:

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1. S.RAVEENDRAN, S/O.SUKUMARAN, VAIKARI,
THEKKUMOODU, KUNNUKUZHI, THIRUVANANTHAPURAM,
PIN-695 020.

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

R1 BY ADVS. SRI.S.JIJI
SRI.B.JAYASURYA
R2 BY PUBLIC PROSECUTOR V.H. JASMINE.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 27-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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K. RAMAKRISHNAN, J.

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Crl. R. P. No.462 of 2011

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Dated this the 27^{th} day of February, 2015

<u>O R D E R</u>

Accused in C.C.No.174/2005 on the file of Judicial First Class Magistrate Court-V, (Special Court for Mark list Cases), Thiruvananthapuram, is the revision petitioner herein. The case was taken on file on the basis of a private complaint filed by the complainant herein, against the revision petitioner, alleging offence under Section 138 of the Negotiable Instruments Act (hereinafter called 'the Act').

2. The case of the complainant in the complaint was that, revision petitioner borrowed a sum of ₹1,25,000/- on 12.07.2001 and issued Ext.P2 cheque in discharge of that liability, which when presented was dishonoured for the reason 'funds insufficient', evidenced by Ext.P3 dishonour memo. Complainant issued Ext.P4 notice vide Ext.P5 postal receipt and the same was received by the revision petitioner evidenced by Ext.P6

postal acknowledgment. He had sent Ext.D4 reply notice with false allegations and he had not paid the amount. So he had committed the offence punishable under Section 138 of the Negotiable Instruments Act. Hence the complaint.

3. When the revision petitioner appeared before the court below, the particulars of offence were read over and explained to him and he pleaded not guilty. In order to prove the case of the complainant, originally the power of attorney holder of the complainant authorized by Ext.P1 power of attorney, who is none other than the father-in-law of the complainant was examined as PW1 and Exts.P1 to P6, P7, P7(a) and P7(b) were marked on his side. After closure of the complainant's evidence, the revision petitioner 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 further stated that, he had no money transaction with the complainant. In fact, the complainant/ PW2 and one Das and himself were working in Saudi Arabia and they were residing in the same room. One Jayan was taken to Saudi Arabia by the revision petitioner and the complainant was conducting a chitty among the friends and the said Jayan was a subscriber to the same and he had bid the chitty but defaulted and an amount of 4,000/- Riyals was due from him and he absconded. Since the said Jayan was introduced to the complainant by the revision petitioner, he wanted the revision petitioner to pay the amount and there was some altercation occurred and the complainant informed the police about the illegal stay of the revision petitioner and accordingly the Saudi Arabia police arrested him and thereafter he was deported by virtue of emergency pass and there is no transaction. In order to prove his case, revision petitioner himself was examined as DW1 and one witness was examined as DW2 and Exts.D1 to D6 and D6(a) were marked on his side.

4. After considering the evidence on record, the court below had compared the admitted signature in Ext.P7(a), which is the specimen signature of the revision petitioner produced by the bank authority along with his account particulars and come to the conclusion that the signature in Ext.P1 and ExtP7(a) are one and the same and disbelieved the case of the revision petitioner and convicted him for the offence under Section 138 of the Act and sentenced him to undergo simple imprisonment for six months and also to pay the cheque amount of ₹1,25,000/- as compensation to the complainant, in default to undergo simple imprisonment for 15 days. The revision petitioner filed Criminal Appeal No.1080/2007 against the judgment of the trial court before the Sessions Court, Thiruvananthapuram and it was made over to the Additional Sessions Court (Adhoc-IV),

Thiruvananthapuram, for disposal and the learned Additional Sessions Judge allowed the appeal in part, confirming the order of conviction and order to pay compensation, but reduced the substantive sentence to imprisonment till rising of court. Dissatisfied with the same, the present revision has been filed by the revision petitioner/accused before the court below.

5. Heard the counsel for the revision petitioner, first respondent and learned Public Prosecutor.

6. The counsel for the revision petitioner submitted that, since he had denied the execution of the cheque, including the handwriting and signature, the burden is on the complainant to prove the same, which he did not discharge. Further the evidence of DWs 1 and 2 will go to show that, there is no possibility of any transaction as contended by the complainant and revision petitioner issuing any cheque. He had relied on the

decision reported in **M/s. Kumar Exports v. M/s. Sharma Carpets (2009 KHC 219)** in support of his case.

7. On the other hand, the counsel appearing for the first respondent submitted that, the evidence of PWs 1 and 2 will go to show that the revision petitioner had borrowed the amount and issued the cheque. It is true that they do not know who was written the cheque. But since he had denied the signature, court under Section 73 of the Evidence Act compared the signature in the specimen signature card produced from the bank of the accused and came to the conclusion that the signature in Ext.P1 cheque was that of the revision petitioner. So under the circumstances, courts below were perfectly justified in convicting the revision petitioner for the offence alleged.

8. The case of the complainant in the complaint was that, on 12.07.2001, the revision petitioner

borrowed a sum of ₹1,25,000/- and issued Ext.P2 cheque in discharge of that liability, agreeing to pay the amount within one month and requesting the complainant to present the cheque after one month. Accordingly the cheque was presented and it was dishonoured and in spite of notice issued, the revision petitioner had not paid the amount. The fact that, notice was issued and in spite of notice issued amount was not paid etc., is not in dispute. The case of the revision petitioner was one of total denial.

9. It is true that PW1 the father-in-law had only deposed that, on 12.07.2001, the revision petitioner came to the house and at that time his son-in-law/ PW2 had given ₹1,25,000/- to the revision petitioner and the revision petitioner had handed over Ext.P1 cheque. He had stated that he did not know whether the handwriting and signature in Ext.P2 were that of the revision petitioner. Further when PW2 was examined, he had also

stated that the revision petitioner had borrowed the amount and issued the cheque. In the cross examination he had stated that he did not know in whose handwriting the cheque was written and he did not know whether the signature in Ext.P2 was that of the revision petitioner. It is true that, if the execution of the cheque is denied, then the burden is on the complainant to prove the same, but in a case where the cheque was not executed in their presence, but the cheque was brought and delivered to the complainant when the amount was paid, then they can only prove the delivery of the cheque. Once the delivery of the cheque is proved, then it can only be presumed that, it was executed and handed over by the accused when the amount was received, then the burden is on the accused to disprove the same.

10. The case of the revision petitioner was that, the cheque book was received at the time when he was in jail and misusing the joint residence of the room at

that time, the cheque leaf was some how obtained by the complainant and the present complaint was filed. It is true that Ext.D1 will go to show that he was deported by emergency pass on 16.08.1997. It is also seen from Ext.D3 letter dated 13.05.1997, issued from the bank that the account was opened at that time. Ext.D3 and D3(a) are documents relied on by the revision petitioner to prove that the documents were sent while he was in Gulf. But it may be mentioned here that though he had a case that, he was in jail for $3^{1/2}$ months, till he was released and deported as per Ext.D1, there is no documentary evidence adduced on his side to prove that fact.

11. Merely because Ext.D1 shows that he was deported on the basis of an emergency pass, it does not mean that, he was detained in jail for the period mentioned by the revision petitioner. Further Ext.D3 and D3(a), the foreign address was not mentioned. So it cannot be said that this was delivered in the foreign

address as claimed by the revision petitioner. The evidence of DW2 is also not helpful to prove this fact. PW2 had denied joint residence of the persons mentioned by the revision petitioner including DW2. Both DW1 and DW2 had admitted that they have no document to show that both the revision petitioner and the complainant and the witness were working in the same company and they were residing in the same room as claimed by them. Further according to DW2, there was assault by PW1 on the revision petitioner and he sustained injuries, but DW1 had no such case. So under the circumstances, the courts below were perfectly justified in not relying the evidence of DWs 1 and 2 on that aspect.

12. Further the revision petitioner had no case that, he had not received the cheque book. According to him, after he was deported, the cheque book and other belongings were received by him. But he did not make any complaint to the bank regarding the misusing of the

cheque at that time. Further he did not produce the cheque book also to prove, as to whether other cheques were used by him or what happened to other two cheques prior to Ext.P2 cheque as well. His case was that, he did not know English and he was not in the habit of writing in English, but Ext.P7(a) the specimen signature card produced by the bank will go to show that he had put his signature as “Shaji” in English by using English letters. Further the way in which the signature put in English, it cannot be said that, it was put by the person who did not know English. Further, court below had examined Ext.P7(a) and compared the signature in Ext.P7(a) with that in disputed Ext.P2 cheque and came to the conclusion that it was identical and similar. Further the cheque was not returned by the bank for the reason signature differs as well and it was returned only for the the reason 'funds insufficient'. Since these things were proved by the complainant, the burden is on the revision petitioner to prove by sending Ext.P2 cheque for expert opinion, which he had not done.

13. Further, in the decision relied on by the counsel for the revision petitioner namely **Ms/. Kumar Exports v. M/s. Sharma Carpets (2009 KHC 219)**, the Hon'ble Supreme Court has held that, the wordings under Section 138 and 118 of the Negotiable Instruments Act says that, the court shall presume regarding the issuance of the cheque for discharge of a legally enforcible debt and it was supported by consideration respectively, unless the contrary is proved by the drawer of the cheque. In this case, no acceptable evidence was adduced on the side of the revision petitioner to prove this fact. It is true, in that case, the accused had adduced evidence to disprove the transaction claimed by the complainant for which the alleged cheque was issued and it was on that basis the Hon'ble Supreme Court has come to the conclusion that the accused had rebutted the

presumption and disproved the case of the complainant and acquitted the accused. That was not the case here. So under the circumstances, courts below were perfectly justified in rejecting the case of the revision petitioner on the basis of the evidence available and the circumstances mentioned and relying on the evidence of PWs 1 and 2 coming to the conclusion that the complainant had proved that the revision petitioner had borrowed the amount and issued Ext.P2 cheque in discharge of that liability and rightly convicted him for the said offence. The concurrent findings of the court below on this aspect do not call for any interference.

14. As regards the sentence is concerned, though the trial court had sentenced the revision petitioner to undergo simple imprisonment for six months and also to pay the cheque amount of ₹1,25,000/-, as compensation, in default to undergo simple imprisonment for 15 days under Section 357(3) of the Code of Criminal

Procedure. The appellate court while confirming the compensation portion of the sentence, reduced the substantive sentence to imprisonment, till rising of the court. So maximum leniency as shown by the appellate court in imposing the sentence as well. So this court do not find any reason to interfere the sentence imposed, as it cannot be said to be excessive or harsh. The counsel for the revision petitioner also prayed time for payment of the amount.

Considering the amount involved, this court feels that, three months time can be granted to the revision petitioner to pay the amount. So the revision petitioner is granted time till, 27.05.2015 to pay the amount, till then, the execution of sentence is directed to be kept in abeyance. If the revision petitioner had deposited any amount as directed by this court or by the Sessions Court for suspending the sentence, then that amount can be adjusted towards the compensation ordered to be paid and confirmed by this court and the revision petitioner need only to pay the balance amount, within the time mentioned above. If the amount is not disbursed to the complainant, lower court is directed to release the amount to the complainant on his making an application for that purpose.

With the above direction and observation, the revision petition is dismissed and disposed of accordingly. Office is directed to communicate this order to the concerned court, immediately.

Sd/-
K. Ramakrishnan, Judge

// True Copy//
P.A. to Judge

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