

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 27TH DAY OF JANUARY 2015/7TH MAGHA, 1936

Crl.Rev.Pet.No. 110 of 2015 ()

AGAINST THE JUDGMENT IN CRA 546/2011 of THE COURT OF ADDITIONAL
SESSIONS JUDGE-I, TRIVANDRUM DATED 03-07-2014

AGAINST THE JUDGMENT IN CC 48/2009 of COURT OF JUDICIAL FIRST CLASS
MAGISTRATE-V(SPL.COURT-MARKLIST CASES), THIRUVANANTHAPURAM DATED
30-09-2011

REVISION PETITIONER/APPELLANT/ ACCUSED:

BALACHANDRAN, AGED 54 YEARS
S/O PARAMESHWARAN, NJATTADIVARATHU VEEDU,
KAZHUNADU
VATTAPPARA P.O, THIRUVANANTHAPURAM

BY ADV. SRI.SHAJIN S.HAMEED

RESPONDENTS/RESPONDENTS/ STATE & COMPLAINANT:

- 1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM 682031

2. C. MURALEEDHARAN NAIR,
S/O CHANDRAN PILLAI, CHANDRAVILASOM BUNGLOW
VATTAPPARA P.O, THIRUVANANTHAPURAM, 695028

R2 BY ADV. SRI.RAM MOHAN.G.
R2 BY ADV. SRI.G.P.SHINOD
R2 BY ADV. SRI.MANU V.
R2 BY ADV. SRI.GOVIND PADMANAABHAN
R2 BY ADV. SRI.AJIT G.ANJARLEKAR
R1 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION
ON 27-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.T.RAVIKUMAR, J.

Crl.R.P.No.110 of 2015

Dated 27th January, 2015

ORDER

This revision petition is directed against the judgment in Crl.A.No.546 of 2011 of the Court of Additional Sessions Judge-I, Thiruvananthapuram, confirming the conviction and modifying the sentence imposed on the petitioner in C.C.No.48 of 2009 by the Court of Judicial First Class Magistrate-V (Special Court for Mark List cases), Thiruvananthapuram. The petitioner was tried for the offence punishable under Section 138 of the Negotiable Instruments Act. The case of the complainant/2nd respondent is that the revision petitioner herein borrowed an amount of ₹ 2,00,000/- and in discharge of the said legally enforceable debt he issued Ext.P1 cheque. But, on presentation for encashment the said cheque was dishonoured due to insufficiency of fund in the account of the revision petitioner and thereafter he issued a notice intimating the revision petitioner of the dishonour of the cheque and calling upon him to pay the amount due within the statutorily prescribed time limit. It is the failure on the part of the revision petitioner to effect payment within the statutorily prescribed period that constrained the complainant to file the complaint which was taken on file and numbered as C.C.No.48 of 2009. On due process the revision

petitioner appeared before the court and the particulars of the charge were read over and explained to him and the revision petitioner pleaded not guilty. The complainant got himself examined as PW1 and got marked Exts.P1 to P5. On the closure of the evidence of the complainant the revision petitioner herein was examined under Section 313 Cr.P.C. and at the time of his examination the revision petitioner contended that he borrowed only an amount of ₹ 80,000/- from the complainant and the said amount was in fact, repaid. Subsequently, he adduced evidence to substantiate the said contention by examining himself as DW1 and one V.S.Sanil as DW2. On being examined as DW1 the revision petitioner virtually restated the case which he had put up at the time of examination under Section 313 Cr.P.C. He took up the contention that he borrowed only an amount of ₹ 80000/- from the 2nd respondent/complainant and he had discharged the said debt. He deposed that though he repaid the amount borrowed the 2nd respondent had not returned the cheque which was issued as security. At the same time, the revision petitioner could not adduce any evidence to show that he had repaid the amount. The revision petitioner got examined DW2 who is an autorickshaw driver to support the said case. DW2 deposed before the court that he had witnessed the transactions between the revision petitioner and the 2nd respondent on three occasions viz., on 15.10.2005, 27.10.2005 and 24.11.2005. The courts below took note of the evidence

adduced by the complainant/2nd respondent consisting of his own oral testimony as PW1 and the documentary evidence in Exts.P1 to P5 as also the evidence of DW1 and DW2. It was found that the transactions with the 2nd respondent was admitted by the revision petitioner and at the same time, he could not adduce any evidence to show that the actual transaction was only for an amount of ₹ 80,000/- and that amount was actually repaid by him. Evidently, the revision petitioner did not dispute his signature in Ext.P1. On evaluation of the evidence the courts below arrived at the conclusion that the complainant/2nd respondent was entitled to get the benefit of the presumption available under Sections 118(a) and 139 of the Negotiable Instruments Act and that the revision petitioner had failed to dislodge the presumption by adducing evidence. What should be the degree of evidence to be adduced by an accused to dislodge that presumption has been considered by the Hon'ble Apex Court in Krishna Janardhan Bhat v. Dattatraya G. Hegde ((2008) 2 SCC (Crl.) 166) whereunder the Hon'ble Apex Court held that the prosecution must prove the guilt of the accused beyond all reasonable doubt and at the same time, the standard of proof required on the part of the accused is 'preponderance of probabilities'. The revision petitioner could not bring out a case that the findings of the courts below made concurrently that the 2nd respondent was entitled to get the presumption in his favour is an outcome of perverse appreciation of evidence or that it is totally against the weight of evidence. In this case, to dislodge the presumption

thus available the revision petitioner got examined as DW1 and also examined DW2. The courts below considered the defence evidence and found that it was not sufficient to dislodge the presumption legally available in favour of the 2nd respondent/complainant based on the weight of evidence adduced by him. Admittedly, the revision petitioner as DW1 deposed to the effect that he availed a loan of ₹ 80,000/- from the complainant and he had repaid the same. According to him, he had issued the cheque only as a security and it was misusing the same that the complaint was filed. DW2 was examined on the side of the complainant claiming that he had witnessed the borrowal of ₹ 80,000/- from the complainant. Evidently, DW2 deposed that the accused initially borrowed a sum of ₹ 25,000/- and thereafter on two occasions borrowed ₹ 50,000/- and ₹ 25,000/- respectively. He had witnessed the borrowal of ₹ 80,000/- as well. The revision petitioner did not have a case that they have not given evidence as mentioned above. The totality of the evidence thus adduced on behalf of the accused would only lead to the position that he had money transaction with the complainant and that he had issued cheque in relation to the said transaction. The courts below held that the revision petitioner had not adduced any evidence to establish repayment of the borrowed amount. The revision petitioner got no case that he had adduced any such evidence. In such circumstances, taking note of the prevarication and the absence of evidence relating repayment the defence evidence was, virtually, found insufficient to

dislodge the presumption and the courts below held that the complainant conclusively established the commission of the offence by the revision petitioner. On going through the judgments of the trial court as also the appellate court I do not find any reason to hold that the appreciation of evidence by the courts below is utterly perverse or against the weight of evidence warranting an interference invoking the revisional jurisdiction. In the said circumstances, the conviction entered against the revision petitioner by the courts below calls for no interference and as such it is confirmed. Now, the question is whether any interference is warranted with the sentence imposed by the trial court which was modified by the appellate court. For the conviction under Section 138 of N.I. Act the trial court sentenced the petitioner to undergo simple imprisonment for six months and to pay a fine of ₹ 2,00,000/- and in default of payment of the amount of fine he was directed to undergo simple imprisonment for three months. The amount of fine on realisation was directed to be paid to the 2nd respondent/the complainant as compensation under Section 357(1) Cr.P.C. The appellate court interfered with the sentence imposed by the trial court for the conviction under Section 138 of N.I. Act and modified the same. Evidently, the substantive sentence to undergo imprisonment was set aside by the appellate court. The appellate court sentenced the revision petitioner to pay a sum of ₹ 2,00,000/- as fine and further ordered that the said amount, if realised, should be paid as compensation to the complainant under Section

357(3) Cr.P.C. The default clause was also interfered with and it was reduced to two months' simple imprisonment. There can be no doubt that a conviction must be followed by a sentence. In such circumstances, maintaining the sentence of payment of fine cannot be said to be illegal and warranting interference. At the same time, a bare perusal of Section 357(3) Cr.P.C. would reveal that it would apply only in a case where fine does not form a part of the sentence. In such circumstances, after maintaining the sentence of fine an order/direction for compensation under Section 357(3) Cr.P.C. could not have been passed. In this case, it is to be noted that the appellate court sentenced him to pay a fine of ₹ 2,00,000/- and interfered with the direction to undergo simple imprisonment for a period of three months in case of failure to pay the amount of fine and reduced it to a direction to undergo simple imprisonment for a period of two months. Evidently, the appellate court has maintained the sentence to pay the fine and therefore, in view of the provisions under Section 357(3) Cr.P.C. a direction to pay it as compensation to the complainant under Section 357(3) Cr.P.C. could not have been passed legally. In other words, there was no reason to interfere with the order of the trial court to pay the amount of fine on realisation as compensation under Section 357(1) Cr.P.C. Hence, the order passed by the appellate court to pay it as compensation under Section 357(3) Cr.P.C. is set aside and the order of the trial court to pay it as compensation under Section 357(1) Cr.P.C. is restored. However,

the direction of the appellate court that the revision petitioner shall undergo simple imprisonment for two months in case of failure to pay the amount of fine is retained. When this Court was about to dismiss the matter subject to the above the learned counsel for the revision petitioner submitted that some reasonable time may be granted to the revision petitioner to effect payment of the amount of fine. Taking note of the said submission and also taking note of the amount of fine I am inclined to direct the learned Magistrate to keep in abeyance execution of the sentence for a period of six months to enable the revision petitioner to pay the same within the above stipulated time. Ordered accordingly. In case of failure on the part of the revision petitioner to pay the amount of fine within the above stipulated time the learned Magistrate shall take appropriate steps to execute the sentence in accordance with law.

Subject to the above, this revision petition is dismissed.

Sd/-
C.T.RAVIKUMAR
Judge

TKS