

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

Crl.Rev.Pet.No. 323 of 2015 ()

AGAINST THE JUDGMENT IN CRL.A 282/2013 & ORDER IN CMP 26/2015
of ADDL. SESSIONS COURT, KOZHIKODE- II DATED 21-1-2015

AGAINST THE JUDGMENT IN CC 290/2012 of SPL.J.M.F.C. FOR TRIAL
OF MARADU CASES, KOZHIKODE DATED 16-05-2013

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

K.SATHYANADHAN, AGED 52 YEARS
S/O.BHASKARAN, AMIN, DISTRICT COURT,
KOZHIKODE

BY ADVS.SRI.P.V.KUNHIKRISHNAN
SRI.P.V.ANOOP

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

1. A.RAVEENDRAN, AGED 55 YEARS
S/O.BALAN, SREEJA PRINTERS,
NEAR SYNDICATE BANK, CHEROOTY ROAD
KOZHIKODE - 673 004.

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

R1 BY ADV. SRI.NIRMAL. S
R2 BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 29-06-2015, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

OKB

K.HARILAL, J.

Cr1.R.P. No.323 of 2015

Dated this the 29th day of June, 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.282/2013 and CMP No.26/2015 on the files of the court of the II Additional Sessions Judge, Kozhikode Division. The above appeal was filed challenging the judgment finding that the revision petitioner is guilty of the said offence, passed in C.C.No.290/2012 on the files of the Special Judicial First Class Magistrate's Court (Marad Cases), Kozhikode. According to the impugned judgment, the revision petitioner was sentenced to undergo simple

imprisonment for one day till rising of the court and to pay a compensation of Rs.3,50,000/- to the complainant under Section 357(3) of the Cr.P.C. and in default to undergo simple imprisonment for two months.

2. Though this revision petition has been filed challenging the concurrent findings of conviction and sentence on various grounds, the learned counsel for the revision petitioner mainly canvassed the point that the appellate court went wrong by dismissing CMP No.26/2015 filed by the petitioner under Section 391 of the Cr.P.C. The learned counsel further contends that after the passing of the impugned order by the trial court a crime was registered against the complainant under Sections 3 & 4 read with Section 17 of the Kerala Money Lenders Act and under Section 3 read with Section 4 of Prohibition of Charging Exorbitant Interest Act, by the Kozhikode Town police Station as crime No.452/14 and during the search conducted at the office of the complainant, blank stamp papers and blank cheques bearing the signature

of the revision petitioner were seized. According to the revision petitioner, the said documents are vital as well as significant to prove the innocence of the petitioner in the instant case also. In the above context, the revision petitioner filed the above CMP. But the court below dismissed the said application on a finding that the revision petitioner is trying to make out a case different from one already on record and also trying to fill up the lacuna. According to the learned counsel for the revision petitioner, appeal is a continuation of the trial. Therefore, the appellate court ought to have allowed the application so as to give an opportunity to the revision petitioner to adduce evidence to substantiate his case in defence.

3. Per contra, the learned counsel for the first respondent advanced arguments to justify the findings whereby the court below dismissed the CMP seeking an opportunity to adduce further evidence. Thus, the question raised in this revision petition revolves around the power of the appellate court under Section 391 of the Cr.P.C.

4. Going by the impugned judgment passed by the appellate court it is seen that the appellate court dismissed the said application on the ground that the petitioner in defence denied the transaction with the complainant and, according to the accused, he has never been involved in any money transaction with the complainant. More over, in the reply notice, he has stated that the real fact pertaining to the possession of his cheque by the complainant is suppressed herein for a valid legal reason to be unearthed before the court of law in which the complainant choses to initiate legal action against the accused. At the stage of evidence the accused had explained how Ext.Pl cheque happened to be in the possession of the complainant. Even a suggestion has not been put to the complainant on the circumstances under which Ext.Pl happened to be with the complainant. The accused has submitted a detailed statement under Section 313 of the Cr.P.C. In that statement also, he did not state anything about the transaction and the possession of the cheque by P.W.1. Therefore, it can be

safely concluded that no defence version at all was advanced by the accused in the case.

5. In my view, unlike prosecution for other offences, in a prosecution under Section 138 of the N.I.Act, the accused must have a definite case in defence as regards the possession of the cheque at the hands of the complainant. That is what is intended by issuing a statutory notice under Section 138(b) of the N.I.Act. That apart, a presumption also stands in favour of the complainant under Sections 139 and 118 (a) of the N.I.Act and unless that presumption is rebutted by the preponderance of probability, the presumption will stand in favour of the complainant. Therefore, in a prosecution under Section 138 of the N.I.Act, it is incumbent upon the accused to explain as to how the cheque happened to be in the possession of the complainant. In the instant case, the accused has no case that he has handed over signed blank cheques or stamp papers to the complainant in connection with the transaction. In the absence of such a case, during the trial, the accused cannot be permitted to set up a

defence afresh on the basis of a contention, which was not raised during the course of trial. As rightly held by the court below, the revision petitioner is trying to make out a new case different from the one already on record. In this analysis, I find that there is no illegality or impropriety in the order passed in CMP No.26/2015 rejecting the application filed under Section 391 of the Cr.P.C.

6. It is to be borne in mind that the power of the appellate court to take further evidence cannot be pressed into service as a matter of course and it remains with the satisfaction of the court that further evidence of the case is required for the proper adjudication of the case. The revision petitioner cannot claim as a matter of right unless the appellate court is satisfied of the requirement of further evidence. The court below is justified in denying an opportunity to adduce further evidence on the basis of a plea which was not raised during the course of trial.

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 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.

8. Having regard to the nature and gravity of the offence and in the light of the decisions quoted above, the revision petitioner is given six months time to pay the compensation. Consequently, this revision petition will stand disposed of subject to the following terms:

- i. The revision petitioner shall undergo simple imprisonment for one day till rising of the court.
- ii. He shall pay a compensation of Rs.3,50,000/- (Rupees Three lakhs and fifty thousand only) within a period of six months from today to

the 1st respondent/complainant, under Section 357(3) of the Cr.P.C.

iii. He shall appear before the Trial Court to suffer the substantive sentence of simple imprisonment as ordered above on or before 30/12/2015 with sufficient proof to show payment of compensation.

iv. In default, he shall undergo simple imprisonment for a period of two months.

The Criminal revision petition is disposed of accordingly.

Sd/-
K. HARILAL, JUDGE

okb/stu