

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 26TH DAY OF JUNE 2015/5TH ASHADHA, 1937201

Cr1.Rev.Pet.No. 785 of 2015

AGAINST THE JUDGMENT IN CRL.A.NO. 311/2015 of ADDITIONAL
DISTRICT & SESSIONS COURT - IV, KOZHIKODE DATED
25-03-2015.

AGAINST THE JUDGMENT IN CC.NO. 200/2012 of J.M.F.C.-IV,
KOZHIKODE DATED 02-05-2014.

REVISION PETITIONER/APPELLANT/ACCUSED/DF:

PAUL JOSEPH, S/O. K.D. JOSEPH, 6/175,
MALABAR CHRISTIAN COLLEGE CROSS ROAD,
KOZHIKODE-673 011.

BY ADVS.SMT.V.P.SATHI
SMT.O.V.BINDU

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE:

1. K.G. VINCENT, AGED 47 YEARS, S/O. K.A. GEORGE,
5/314B, CHINGATHARA HOUSE, CIVIL STATION P.O.,
ERANHIPALAM, CALICUT-673 020. (DOOR NO.L-5,
4TH CROSS TANK ROAD, NR. MOHALLA,
MYSORE-670 007) .
2. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, KOCHI-682 031.

R2 BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB

THIS CRIMINAL REVISION PETITION HAVING COME UP
FOR ADMISSION ON 26-06-2015, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No. 785 of 2015

Dated this the 26th day of June, 2015

ORDER

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.311 of 2014 on the files of the Additional District and Sessions Judge-IV, Kozhikode. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.200 of 2012 on the files of the Judicial First Class Magistrate's Court-IV, Kozhikode. According to the impugned judgment, the Revision Petitioner is sentenced to

undergo simple imprisonment for three months and to pay a fine of ₹78,10,000/- under Sec.138 of the N.I. Act. In default of payment of fine, he shall undergo simple imprisonment for a further period of three months. If the fine amount is realised, the same shall be paid as compensation to the complainant.

2. The case of the complainant is that in the year 2007, as per the inducement of the accused, he paid an amount of ₹38 lakhs to the accused for purchasing landed properties. Out of this amount, ₹17 lakhs was paid by Demand Draft and the rest of the money was paid through money transfer from Dubai to the account of the accused in HDFC Bank. After 4 years, that is in 2011, the accused informed him that the properties purchased were sold and, as a share in the same transaction, the accused agreed to give ₹85 lakhs being the capital invested and profits derived from the same. Towards the discharge of the said liability, on 28/7/2011, the accused, in the presence of

the complainant at the residence of the accused, executed Exts.P1 and P2 cheques for an amount of ₹45 lakhs and ₹40 lakhs respectively. Thereafter, towards the discharge of a part of the liability, the accused paid a sum of ₹7 lakhs to the complainant on 4/10/2011. Thereafter, during January, 2012 the complainant presented the cheques for collection through his banker and the the same were dishonoured and returned for want of sufficient fund and thereby the accused committed the offence punishable under Sec.138 of the N.I. Act.

3. In defence, the accused filed a written statement stating that he has no financial transaction with the complainant. The complainant is employed at abroad and he is a Non-Resident Indian. The complainant requested two cheque leaves of the accused stating that for the purpose of a loan for the complainant from Canara Bank, Mysore Branch, the bank demanded to signed blank cheque leaves of a

non NRI. Accordingly, the accused handed over two signed blank cheque leaves to the complainant. It was by misusing those cheque leaves the complainant filed the present complaint.

4. Going by the evidence, it is seen that the complainant was examined as P.W.1 and Exts.P1 to P9 were marked. He has given evidence in conformity with the averments in the complaint. Though he was subjected to cross-examination, no evidence brought to discredit his evidence or to probabalise the defence story put forward by the accused. In that context, the court below observed that the complainant has successfully discharged the initial burden of proving execution and issuance of the cheques and thereby the presumption under Secs.139 and 118(a) of the N.I. Act will stand in favour of the complainant.

5. What remains to be considered is whether the accused had succeeded in rebutting the said presumptions. No oral or documentary evidence was

let in by the accused. When examined under Sec.313 Cr.P.C., the accused denied all the incriminating evidence tendered against him. The accused filed a written statement stating the defence version as stated above. No evidence, either oral or documentary, has been produced to substantiate the defence version, at least, with the standard of preponderance of probabilities. That apart, it is pertinent to note that though the complainant had issued Exts.P6 and P7 lawyer's notice in respect of Exts.P1 and P2 to the accused intimating the dishonour of the cheques and demanding the amount covered therein, the accused received the notice; but did not pay the amount; nor did he send a reply denying the liability under the cheques. He has not offered any explanation regarding the failure to send reply notice. Failure to send reply notice does not tantamount to proof of execution of cheques or give rise to a presumption that the defence set up by the

accused be disbelieved in toto; but, it is a very strong circumstance which goes against the accused and an inference can be drawn that he is not disputing the demand. In the instant case, the accused kept silence on receipt of notice threatening criminal prosecution. Failure to send reply notice against the lawyer's notice demanding huge amount of ₹85 lakhs speaks volumes against the revision petitioner. The above view is supported by the decision in Gopakumar P. Vs. B. Anilkumar [2011 (2) KLD 455]. Mere challenge set up in cross-examination is not sufficient to rebut the presumption under Secs.139 and 118(a) of the N.I. Act [Senath v. Johnson and another (2012 (1) KLT 32)]. In the absence of any kind of evidence from the revision petitioner, the court below is fully justified in finding that the accused miserably failed to rebut the presumption under Secs.139 and 118(a) of the N.I. Act which stood in favour of the revision petitioner.

6. The learned counsel for the Revision Petitioner reiterated the contentions which were raised before the courts below and got rejected concurrently. The learned counsel urged for a re-appreciation of evidence once again, which is not permissible under the revisional jurisdiction unless any kind of perversity is found in the appreciation of evidence. The Revision Petitioner failed to point out any kind of perversity in the appreciation of evidence. The courts below had concurrently found that the complainant/1st respondent had successfully discharged initial burden of proving execution and issuance of the cheque; whereas the Revision Petitioner had failed to rebut the presumption under Section 118(a) and 139 of the N.I. Act which stood in favour of the 1st respondent. So also, it is found that the debt due to the 1st respondent was a legally enforceable debt and Exts.P1 and P2 cheques were duly executed and issued in discharge of the said debt. I do not find any kind of

illegality or impropriety in the said findings or perversity in appreciation of evidence, from which the above findings had been arrived. Therefore, I am not inclined to re-appreciate entire evidence once again and I confirm the concurrent findings of conviction.

7. The substantive sentence imposed on the revision petitioner is too harsh and excessive, is the submission of the learned counsel for the revision petitioner. Further, prayed for setting aside the sentence of imprisonment also. If the revision petitioner is incarcerated for a period as ordered by the courts below, the entire family will put in great hardship.

8. 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 vs. 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.

9. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and the last submission made at the Bar, expressing willingness to pay the fine within six months, if this revision petition is found liable to be dismissed. I am inclined to grant six months time to pay the compensation. Similarly, the substantive sentence of imprisonment for three months will stand reduced and modified to simple imprisonment for one day till rising of the court and to pay a fine of ₹78,10,000/- (Rupees Seventy eight lakhs and ten thousand only) within a

period of six months from today. In supersession of the sentence imposed by the trial court and confirmed by the appellate court, the revision petitioner will stand convicted as follows:

i. The Revision Petitioner shall undergo simple imprisonment for one day till rising of the court.

ii. The Revision Petitioner shall pay a fine of ₹78,10,000/- (Rupees Seventy eight lakhs and ten thousand only) within a period of six months from today and the same shall be given to the 1st respondent/ complainant as compensation under Sec.357(1)(b) of the Cr.P.C.

iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 28/12/2015 with sufficient proof to show payment of compensation.

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a period of three months.

The Criminal Revision Petition is disposed of accordingly.

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge