

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

TUESDAY, THE 28TH DAY OF JULY 2015/6TH SRAVANA, 1937

Crl.Rev.Pet.No. 906 of 2015

AGAINST THE JUDGMENT IN CRL.A.NO. 533/1999 of ADDITIONAL
DISTRICT & SESSIONS COURT (ADHOC)-II, KOZHIKODE DATED
05-09-2002

AGAINST THE JUDGMENT IN ST 4101/1996 of J.M.F.C.-V,
KOZHIKODE DATED 01-10-1999

REVISION PETITIONER/APPELLANT/ACCUSED:

K.P.RADHAKRISHNAN, S/O. PONNAPPAN ACHARI,
KUNHIKULAM VALLAPPIL, GOVINDAPURAM,
KOZHIKODE DISTRICT.

BY ADV. SRI.SUNNY MATHEW

RESPONDENTS/RESPONDENTS/COMPLAINANT AND STATE:

1. V.E.MOIDEEN KOYA, S/O. HASSANKOYA,
VADAKKE EDASSERI, PANTHEERANKAVU,
KOZHIKODE.
2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL REVISION PETITION HAVING COME UP
FOR ADMISSION ON 28-07-2015, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No.906 of 2015

Dated this the 29th day of July, 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.533 of 1999 on the files of the Additional District & Sessions Judge, Fast Track (Ad-hoc-II), Kozhikode. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in S.T.No.4101 of 1996 on the files of the Judicial First Class Magistrate's Court-V, Kozhikode. According to

the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment for three months. Set off, if any, is also allowed.

2. The complainant's case is that the accused borrowed an amount of ₹50,000/- from the complainant on 1/9/1996 promising him to return back the same within two weeks and when demanded, the accused has drawn and issued Ext.P1 cheque for an amount of ₹50,000/- to the complainant. When the complainant presented the cheque for encashment, the same was dishonoured for want of sufficient funds. The complainant had caused to issue a lawyer's notice and the accused received the same; but he has not paid the amount; nor has he sent any reply to the notice.

3. To prove the execution and issuance of the cheque, the complainant was examined as P.W.1 and Exts.P1 o P5 were marked. After evaluating the aforesaid evidence, the court below concurrently

arrived at a finding that the complainant has successfully discharged the initial burden of proving the execution and issuance of the cheque. I do not find any reason to interfere with the appreciation of the above evidence.

4. What remains to be considered is, whether the accused had succeeded in rebutting the presumptions under the N.I. Act which stood in favour of the complainant. To rebut the presumptions, the accused examined D.Ws.1 to 4 and marked Exts.D1 and D2. The defence set up by the accused is that the accused started to reside in the house of P.W.1 on rental basis from 15/5/1996 on paying ₹10,000/- as security. While the accused was residing in the rented house of P.W.1, he borrowed an amount of ₹25,000/- from him. To discharge the said liability, the accused sold his gold ornaments worth ₹5,972/- to the complainant on assurance that the said amount will be adjusted towards the loan

advanced by him. The deposit of ₹10,000/- which he had given to the complainant was also adjusted towards the loan. Thus, when he vacated the house of P.W.1 on 15/1/1997, the outstanding amount to be adjusted to the loan advanced by P.W.1 was only ₹9,028/-. On that day itself, he issued a cheque for ₹5,000/- to P.W.1. Thus, the amount he has to pay to P.W.1 is only ₹4,028/-. After analysing the evidence of D.Ws.1 to 4, the courts below concurrently observed that there is no clinging evidence on record to prove that the accused had given an amount of ₹10,000/- to P.W.1 as advance when he occupied the house of P.W.1. D.W.2 was examined as a person who has entered into an agreement with the complainant for taking the house on rent for and on behalf of the accused. During cross-examination, D.W.2 would say that he has not given any amount to P.W.1 and there was no money transaction between himself and P.W.1. Thus, there

is no piece of paper to show that P.W.1 has received an amount of ₹10,000/- from the accused as advance as deposed by D.W.2. As rightly observed by the court below, if any advance had been given to the house owner, naturally the occupier might have obtained some documents from the house owner. The trial court which had an opportunity to witness the demeanour of the witness observed that the contention of D.Ws.2 and 4 cannot be swallowed without a pinch of salt as accused did not send a reply to Ext.D3 notice raising all the contentions put up in defence. Thus, the courts below are justified in finding that the accused miserably failed to rebut the presumptions under the N.I. Act which stood in favour of the complainant. There is no illegality or impropriety in the impugned judgment.

5. 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 Ext.P1 cheque was 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.

6. The learned counsel for the revision petitioner submits that the sentence imposed on the revision petitioner is disproportionate with the nature and gravity of the offence. Further sought for some time to pay the compensation, if the revision is found meritless.

7. Similarly, the substantive sentence imposed on the revision petitioner is too harsh and excessive. The learned counsel for the revision petitioner 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 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 submission made at the Bar, the substantive sentence of simple imprisonment for three months is reduced and modified to simple imprisonment for one day till rising of the court and the petitioner is given three months time to pay the

compensation. Consequently, in supersession of the sentence imposed by the trial court and confirmed 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. The Revision Petitioner shall pay a compensation of ₹50,000/- (Rupees Fifty thousand only) to the 1st respondent/complainant under Sec.357(3) of the Cr.P.C. within a period of three months from today.

iii. The Revision Petitioner shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 29/10/2015 with sufficient proof to show payment of compensation.

iv. In default, the Revision Petitioner shall undergo simple imprisonment for a

period of two months.

v. If he had deposited any amount in the trial court towards compensation or fine, the same shall be given credit to and the balance alone needs to be paid as compensation or fine, as the case may be, and in that event, the complainant is allowed to realise such deposit from the court.

The Criminal Revision Petition is disposed of accordingly.

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge