

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 24TH DAY OF JULY 2015/2ND SRAVANA, 1937

Crl.Rev.Pet.No. 909 of 2015 ()

CRL.A 370/2014 of ADDL. DISTRICT & SESSIONS COURT - IV, KOZHIKODE

ST 163/2013 of J.M.F.C.-II, KOYILANDY

REVISION PETITIONER/APPELLANT/ACCUSED :

M.VASUDEVAN, AGED 63 YEARS

S/O. CHERIYOMANA NAIR, UMMACHIVEEDU, KOLLAM P.O.
KOYILANDY, KOZHIKODE DISTRICT-673 307.

BY ADV. SRI.S.A.ANAND

RESPONDENT(S)/RESPONDENTS/COMPLAINANT & STATE :

1. M.K.GIRIDHARAN, AGED 45 YEARS

S/O. BALAKRISHNAN, SMITHAGIRI HOUSE
PANTHALAYANI AMSOM & DESOM, KOYILANDY TALUK.

2. STATE OF KERALA

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

R2 BY PUBLIC PROSECUTOR SRI.JIBU.P.THOMAS.

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 24-07-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

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K.HARILAL, J.

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Crl.R.P.No. 909 of 2015

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Dated this the 24th 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.370/2014 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 S.T.No.163/2013 on the files of the Judicial First Class Magistrate's Court-II, Koyilandy. According to the impugned judgment, the Revision Petitioner is sentenced to undergo simple imprisonment for one day till rising of the court and to pay a fine of ₹1,20,000/- under Section 357(1)

Cr.P.C., which shall be given to the complainant as compensation under Section 357(1)(b) of the Cr.P.C. In default, to undergo simple imprisonment for a period of three months.

2. The complainant's case is that the accused and complainant are known to each other and they were friends. The accused had borrowed an amount of ₹ 1,00,000/- from the complainant on 01.08.2012 for his personal requirements agreeing to repay the same after two months. On demand of the said amount, the accused drawn and issued Ext.P1 cheque for ₹1,00,000/- to the complainant and when he presented the said cheque for encashment, the same was dishonoured and returned for want of sufficient funds. Though he had caused to issue a lawyer's notice, the accused did not pay the cheque amount but he sent a reply raising false contentions. Thus, he has committed an offence punishable under Section 138 of the N.I.Act.

3. To discharge the initial burden of proving execution

and issuance of the cheque, the complainant was examined as PW1 and Exts.P1 to P5 were marked. After evaluating the evidence of the complainant, the court below arrived at a finding that the complainant had discharged the initial burden of proving execution and issuance of the cheque. I do not find any reason to interfere with the said finding.

4. What remains to be considered is, whether the accused has succeeded in rebutting the presumptions under the N.I.Act which stood in favour of the complainant. No evidence either oral or documentary had been adduced by the accused. But, when he was examined under Section 313 of the Cr.P.C, he set up a defence contention that Ext.P1 cheque was issued as a security for the transaction between the complainant and one Radhakrishnan. But, as noted by the court below, neither in Ext.P5 reply notice nor during the cross examination of PW1, it was stated by the accused as to what was his connection with the said Radhakrishnan. The said Radhakrishnan was not examined

by the accused to prove his contention. The circumstances under which he stood as surety to the said Radhakrishnan was also not stated. In the above view of the matter, the court below is justified in finding that the accused miserably failed to rebut the presumptions which stood in favour of the complainant. There is no illegality or impropriety in the said finding and I do not find any perversity in the appreciation of evidence.

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 or illegality or impropriety in the findings whereby the trial court convicted him.

6. 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.

7. This Court is satisfied that the courts below had meticulously evaluated the evidence on record. 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.

8. At last, the learned counsel for the Revision Petitioner submits that the sentence imposed on the

Revision Petitioner is disproportionate with the gravity and nature of the offence contemplated under Section 138 of the N.I. Act. The learned counsel further sought for sometime to pay the compensation if this revision is found meritless as the petitioner is unable to raise the said amount forthwith due to paucity of funds.

9. 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.

10. Having regard to the nature and gravity of the offence, in the light of the decisions quoted above and submission made at the Bar, I am inclined to grant 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. The Revision Petitioner shall pay a compensation of Rs.1,20,000/- (Rupees One lakh Twenty thousand only) to the 1st respondent/complainant within a period of six months from today under Section 357(3) of the Cr.P.C. If the petitioner had deposited any amount in the trial court in compliance with the interim order of this Court or appellate court, the same shall be given credit to and the balance alone needs to be paid as compensation. In that event, the complainant is allowed to withdraw such deposit, if any.

iii. The Revision Petitioner shall appear before the Trial

Court to suffer substantive sentence of simple imprisonment as ordered above on or before 25th January, 2016 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.A to Judge