

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. 910 of 2015 ()

CRL.A 353/2014 of II ADDL. SESSIONS COURT, ERNAKULAM

CC 946/2011 of ADDL.C.J.M., ERNAKULAM

REVISION PETITIONER/APPELLANT/ACCUSED:

NANDAKUMAR AGED 35 YEARS

S/O.KRISHNANKUTTY, RESIDING AT KARIYAPARAMBIL HOUSE
SOUTH PARAVUR P.O., ERNAKULAM DISTRICT.

BY ADVS.SRI.T.MADHU

SMT.C.R.SARADAMANI

SRI.D.M.SAJEEVAN

RESPONDENT(S)/RESPONDENT/COMPLAINANT & STATE:

1. BABU KUMAR P.C

S/O.CHELLAPPAN, RESIDING AT PEREPPARAMBIL HOUSE
KALLIKUNNU, CHEMBU P.O., VAIKOM
KOTTAYAM DISTRICT.

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:

STU

K.HARILAL, J.

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Crl.R.P.No. 910 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.353/2014 on the files of the II Additional Sessions Judge, Ernakulam. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.946/2011 on the files of the Additional Chief Judicial Magistrate's Court, Ernakulam. 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 ₹ 1,50,000/-, which shall be given to the complainant under

Section 357(1) Cr.P.C. as compensation and in default, to undergo simple imprisonment for three months.

2. The complainant's case is that for the requirement of starting a business, accused borrowed an amount of ₹1,50,000/- from the complainant and he had given that amount after withdrawing the said amount from the account of his wife. After repeated demands, during the third week of July, 2011, for discharging the said liability, the accused drawn and issued Ext.P1 cheque for an amount of ₹ 1,50,000/-. When he presented the cheque for encashment, the same was dishonoured and returned for want of sufficient funds. Though he caused to issue a lawyer's notice demanding the said amount, neither there was any repayment nor any reply. Thus, he has committed the 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 P6 were marked. After evaluating

the aforesaid evidence, the court below observed that the complainant has successfully discharged the initial burden of proving execution and issuance of the cheque and thereby presumption under Sections 139 and 118(a) would stand in favour of the complainant. I do not find any reason to interfere with the said findings.

4. Coming to the rebuttal evidence, no defence evidence was adduced; but when he was examined under Section 313 of the Cr.P.C., he denied the allegation and filed a written statement. In that written statement, he contended that the complainant obtained two signed cheque leaves from him for producing before M/s Amrithasree Kuries as security. According to him, one of the said cheques is Ext.P1. As rightly held by the court below, no document is seen produced to show that the complainant was a subscriber of M/s Amrithasree Kuries. If there was such a transaction, the accused could have examined somebody from M/s Amrithasree Kuries to prove his case.

But, no attempt had been made to prove the transaction between the complainant and M/s Amrithasree Kuries. So also, in spite of the receipt of the lawyer's notice demanding cheque amount as per Ext.P5 A/D card, he has not even cared to send a reply. The eloquent silence of the accused in spite of the receipt of the notice speaks volume and it is fatal to the defence version put forward by the accused. In the above view of the matter, the court below is justified in finding that the accused miserably failed to rebut the presumption under Sections 139 and 118(a) of the N.I.Act which stood in favour of the complainant. There is no illegality or impropriety in any of the findings.

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 he 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.1,50,000/- (Rupees One lakh Fifty thousand only) to the 1st respondent/complainant within a period of six months from today. 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.

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