

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

Crl.Rev.Pet.No. 986 of 2015

AGAINST THE JUDGMENT IN CRL.A.NO. 70/2012 of ADDITIONAL
SESSIONS COURT - III, MANJERI DATED 09-01-2012

AGAINST THE JUDGMENT IN CC 707/2009 of JUDICIAL
MAGISTRATE OF FIRST CLASS-I, MANJERI DATED 17-01-2012

REVISION PETITIONER/APPELLANT/ACCUSED:

N.SUBAIR,
S/O.MONY (LATE), NAMBOLA HOUSE, KALAVATTAM,
KARULAI PO, NILAMBUR, MALAPPURAM DISTRICT.

BY ADVS.SRI.P.VENUGOPAL (1086/92)
SMT.T.J.MARIA GORETTI

RESPONDENTS/RESPONDENTS/COMPLAINANT & STATE:

1. ABDUL LATHEEF MATTARA,
S/O.MUHAMMED, MATTARA HOUSE, UDIRAMPOYIL,
PULLANKODE PO, MALAPPURAM DISTRICT PIN-676 525.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682031.

R1 BY ADV. SRI.K.RAKESH

R2 BY PUBLIC PROSECUTOR SRI. JUSTINE JACOB

THIS CRIMINAL REVISION PETITION HAVING COME UP
FOR ADMISSION ON 10-08-2015, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:

K. HARILAL, J.

Crl.R.P. No.986 of 2015

Dated this the 10th day of August, 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.70 of 2012 on the files of the Additional Sessions Judge-III, Manjeri. The above appeal was filed challenging the judgment finding that the Revision Petitioner is guilty of the said offence, passed in C.C.No.707 of 2009 on the files of the Judicial First Class Magistrate's Court-I, Manjeri. According to the impugned judgment, the Revision

Petitioner is convicted and imposed to pay a fine of ₹3,27,000/-. In default, to undergo three months. Out of the fine amount, ₹3,25,000/- shall be directed to pay as compensation to the complainant under Sec.357(1) of the Cr.P.C.

2. The complainant's case is that the accused had borrowed an amount of ₹3 lakhs from the complainant on 27/3/2009 and on the same time itself, the accused drawn and issued Ext.P1 post dated cheque to the complainant in discharge of the said liability. When he presented the cheque for encashment through his bank, the same was dishonoured and returned for want of sufficient funds. To discharge the initial burden to prove, execution and issuance of the cheque, the complainant was examined as P.W.1 and another witness, who happened to see the transaction, was examined as P.W.2 and withdrawal of the said amount from the bank is proved by Ext.P7 bank pass book. After analysing this evidence, the courts below concurrently

found that the complainant has successfully discharged the initial burden to prove, execution and issuance of the cheque and the presumptions under Secs.118(a) and 139 of the N.I. Act would stand in favour of the complainant. I do not find any illegality or impropriety in the said finding.

3. What remains to be considered is whether the accused had succeeded in rebutting the presumptions which stood in favour of the complainant?

4. The defence case set up by the accused is that the brother of the complainant misused the cheque of the accused through complainant. That is, the accused having some transactions with the father-in-law of the brother of P.W.1 namely Abdurahiman and the accused entrusted one blank signed cheque to the said Abdurahiman towards his business transactions between them. Since the brother of the complainant was the son-in-law of the said Abdurahiman, he was managing the financial family affairs and he has taken the said cheque from the

possession of Abdurahiman. To probabilise the said contention, Abdurahiman was examined as D.W.1. It is pertinent to note that later the marriage, between the brother of the complainant and the daughter of Abdurahiman, was dissolved through Family Court and hence they were in inimical terms and the accused is one of the friends of Abdurahiman. It has come out in evidence that due to the dissolution of the marriage between the complainant's brother and the daughter of Abdurahiman, Abdurahiman was not in good terms with the complainant's family. Therefore, the court below is justified in finding that no reliance can be placed on the evidence of Abdurahiman. This finding is further supported by the absence of such a contention in Ext.P6 reply sent by the accused on receipt of the lawyer's notice. In Ext.P6, he stated that one of the cheques was stolen from him and he has filed an intimation to that effect to the bank. But it has come out in evidence that the accused had not given such an intimation to the bank authority and the

cheque was dishonoured and returned for want of sufficient funds only. During re-examination, D.W.1 also admitted that while issuing lawyer's notice, he was aware about the handing over of the above said cheque. As rightly observed by the court below, if that be so, the accused ought to have narrated the same in Ext.P6 reply notice. More importantly, the accused himself also adduced no oral evidence to substantiate the contentions raised in the notice. Thus, the courts below are justified in finding that the accused has miserably failed to rebut the presumptions under the N.I. Act which stood in favour of the complainant.

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 Sec.138 of the N.I. Act. The learned counsel further sought for some time 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, seeking some time to pay the compensation, 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/accused shall pay a fine of ₹3,25,000/- (Rupees Three lakhs and twenty five 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.

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

iii. 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.

iv. Warrant, if any pending in execution of the sentence, shall be kept in abeyance for a period of six months from today and it would come into operation after six months if the revision petitioner fails to comply the directions, as stated above.

The Criminal Revision Petition is disposed of accordingly.

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge