IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.SUDHEENDRA KUMAR

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

Crl.Rev.Pet.No. 1249 of 2015 ()

Crl.A 192/2011 of SESSIONS COURT,PATHANAMTHITTA
ST 2174/2007 of J.M.F.C.-I,PATHANAMTHITTA

REVISION PETITIONER/APPELLANT/ACCUSED:

SABUKHAN.S., AGED 36 YEARS
S/O. SALIM RAWTHER, VETTARAPARAMBIL HOUSE
KADAKKAD SOUTH, M.M. JUNCTION, PANDALAM P.O -689 501.

BY ADV. SRI.PHILIP M.VARUGHESE

RESPONDENTS/RESPONDENTS/COMPLAINANT:
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1. MAMMEN ABRAHAM, AGED 51 YEARS
   S/O. P.G. MAMMEN, PATHALIL JUS VILLA, THAHEVETTIPURAM
   MYLAPRA P.O, PATHANAMTHITTA, PANDALAM P.O. - 689 501.

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

R1 BY ADV. SRI.T.MADHU
R1 BY ADV. SRI.ROY THOMAS (PATHANAMTHITTA)
R2 BY PUBLIC PROSECUTOR, SHRI.R.GITHESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 13-10-2015, THE COURT ON 19-10-2015 PASSED THE FOLLOWING:

B.SUDHEENDRA KUMAR, J.

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Crl.R.P. No.1249 of 2015

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Dated this the 19th day of October 2015

<u>O R D E R</u>

The revision petitioner is the accused in S.T. No.2174 of 2007 on the files of the Judicial Magistrate of First Class -1, Pathanamthitta.

2. The trial court convicted the revision petitioner under Section 138 of the N.I. Act and sentenced him thereunder to simple imprisonment for nine months and to pay a compensation of Rs.1,55,000/- to the complainant under Section 357(3) Cr.P.C. In the appeal, the conviction was confirmed and the sentence was modified and reduced to imprisonment till the rising of the court and to pay a

compensation of Rs.1,55,000/- to the complainant under Section 357(3) Cr.P.C. Aggrieved by the said conviction and sentence, this revision petition has been filed.

3. Heard.

4. The prosecution allegation is that towards the discharge of the liability of the revision petitioner to the complainant, the revision petitioner issued Ext.P1 cheque in favour of the complainant. The complainant presented the said cheque for encashment. However, the same was dishonoured due to insufficiency of funds in the account of the revision petitioner. Statutory notice was issued on behalf of the complainant, which was received by the revision petitioner. However, the revision petitioner did not pay the cheque amount within the statutory period or

thereafter.

5. Before the trial court, PW1 was examined and Exts.P1 to P6 were marked for the complainant. No evidence was adduced on the side of the revision petitioner.

6. The learned counsel for the revision petitioner relied on the decision of the Apex Court in **K.Subramani v. K. Damodara Naidu** [(2015)1 SCC 99] and argued that since the source of income was not proved by the complainant, the conviction and sentence cannot be sustained. In **K.Subramani**(supra), the source of amount claimed by the complainant was the savings from his salary and an amount of Rs.5,00,000/- derived from the sale of his property. However, there was no averment with regard to the said sale in the complaint or in chief-examination of the

complainant or in his income tax return. The complainant obtained a loan of Rs.1,49,205/- from L.I.C. in the year 1997, which was the year in which the alleged amount of Rs.14,00,000/- was claimed to have been disbursed to the accused in that case. The wife of the complainant in another criminal case stated that the present accused had not taken any loan from her husband. In the said circumstances, the Apex court found that the trial court rightly came to the conclusion that the complainant had no source of income to lend a sum of Rs.14,00,000/- to the accused in that case. Facts of this case are different from the facts in **K.Subramani**(supra). In this case, the complainant stated that an amount of Rs.1,50,000/- was borrowed by the revision petitioner from the complainant and towards the discharge of the said liability, the revision petitioner issued Ext.P1 cheque in favour of the complainant. PW1 stated that he was conducting an Air Travel Agency during the period of the transaction in this case. He started the said business nearly 10 years prior to the transaction in this case. PW1 stated that he was an income tax assessee. The said part of the evidence of PW1 was not assailed in cross-examination. PW1 advanced the amount to the revision petitioner as the revision petitioner was a friend of PW1. Having gone through the evidence of PW1, I am satisfied that PW1 had the capacity to advance Rs.1,50,000/- to the revision petitioner. After evaluating the oral evidence of PW1, the courts below also concurrently found that the complainant had the capacity to advance the amount covered by Ext.P1 cheque to the revision petitioner. In the said circumstances, the facts in **K.Subramani**(supra) are not applicable to the case in hand.

7. It was not stated by PW1 regarding the exact date on which the amount was borrowed. However, PW1 clearly stated that the revision petitioner requested for the amount during May 2007 and after two days, the money was paid by the complainant to the revision petitioner, on the assurance that the amount would be repaid within three months. PW1 had close association with the revision petitioner for about six years. In the said circumstances, the non-mentioning of the exact date of lending the money is not fatal to the prosecution case as argued by the learned counsel for the revision petitioner.

8. It has been further argued by the learned counsel for the revision petitioner that Ext.P4 notice did not contain any demand for the cheque amount and hence there is no demand as contemplated under clause (b) to Section 138 of N.I. Act and consequently, the conviction cannot be sustainable. The learned counsel for the revision petitioner has relied on the decision of the Apex Court in **Rahul Builders v. Arihant Fertilizers and Chemical** [2007(4) KLT 977 (SC)] to buttress his argument. In **Rahul Builders** (supra), the Apex Court held that an omnibus notice without specifying as to what the amount due under the dishonoured cheque would not subserve the requirement of law. In this case, a reading of Ext.P4 would clearly show that the complainant made demand for

the Rs.1,50,000/-, which was the amount covered by Ext.P1 cheque, in the said notice. Therefore, the argument in this regard advanced by the learned counsel fails.

9. The courts below, after evaluating the oral and documentary evidence adduced by the complainant found that the revision petitioner executed Ext.P1 cheque as contemplated under Section 138 of the N.I. Act. The defence had a contention that the revision petitioner had issued a blank signed cheque as a guarantor in a transaction between the complainant and another person and the said cheque had been mis-utilised by the complainant to file the present complaint. Eventhough, a suggestion in this regard was put to PW1 during his cross-examination, PW1 denied the same. There is absolutely no material before the

Court to substantiate the said contention of the revision petitioner by the yardstick of preponderance of probabilities and possibilities. Therefore, the courts below rightly repelled the said contention set up by the defence. Since there is concurrent finding on facts, this Court will not be justified in interfering with the same unless the finding is perverse or incorrect. In this case, no circumstance has been brought to my notice to indicate that the appreciation of evidence by the courts below was perverse or incorrect. Having gone through the relevant inputs, I do not find any reason to interfere with the concurrent finding of the courts below that the revision petitioner committed the offence under Section 138 of N.I. Act.

10. The sentence awarded by the courts below also does not call for any interference by this court.

In the result, this revision petition stands dismissed.

The revision petitioner is granted six months to pay the compensation.

Sd/

B.SUDHEENDRA KUMAR,
JUDGE

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PA to Judge