IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

Crl.Rev.Pet.No. 1515 of 2014

AGAINST THE JUDGMENT IN CRL.A.NO. 390/2012 of II ADDITIONAL SESSIONS COURT (SPL. COURT), KOTTAYAM DATED 18-06-2014.

AGAINST THE JUDGMENT IN ST 140/2011 of J.M.F.C. V, KOTTAYAM DATED 14-12-2012.

REVISION PETITIONER(S)/APPELLANT/ACCUSED:

MANOJ PAUL, AGED 37 YEARS,
S/O.PAUL THOMAS, PARACKAL HOUSE, POOVATHODU P.O.,
CHANGANACHERRY.

BY ADV. SRI.P.V.GEORGE(PUTHIYIDAM)

RESPONDENT(S)/RESPONDENTS/COMPLAINANT AND STATE:

1. JOHN K. THOMAS,
KUNNAMPALLIL HOUSE, PARUTHUMPARA,
KUZHIMATTOM P.O.,
KOTTAYAM, 686001.

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

R1 - BY ADV. SRI.B.V.JOY SANKER
BY ADV. SRI.JACOB CHACKO
BY ADV. SRI.CHERIAN KURIAN
BY ADV. SRI.MATHEWS JOSEPH
R2 - BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 03-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HARILAL, J.

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Crl.R.P. No.1515 of 2014

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Dated this the 3rd day of June, 2015.

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

The revision petitioner is the accused in S.T. No. 140 of 2011 on the files of the Judicial First Class Magistrate's Court-V, Kottayam. He was prosecuted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the N.I. Act') on a complaint filed by the 1st respondent herein. The trial court found that the revision petitioner is guilty of the said offence and he was sentenced to undergo simple imprisonment for one day till rising of the court and to pay a compensation of Rs.2,28,500/- to the complainant and in case of failure to pay the compensation amount, he shall undergo simple imprisonment for a further period of three months. Though he had challenged the said judgment in Crl. Appeal No.390 of 2012, the learned II Additional Sessions Judge (Special), Kottayam, also concurred with the findings of the trial court and dismissed the appeal. The legality and propriety of the concurrent findings of conviction and sentence are under challenge in this revision petition.

2. The complainant's case is that the accused borrowed Rs.8,15,000/- from the complainant in October, 2004 and out of the said amount, Rs.7,90,000/- was given to him by Demand Draft on 26/10/2004 and Rs.25,000/- by way of account payee cheque. The accused had subsequently repaid Rs.6,90,000/- on 4/11/2004 to the complainant and thereafter, he failed to pay the remaining amount. Thus, the accused owed Rs.1,25,000/- to the complainant on 4/11/2004 and in discharge of the said amount, the accused had drawn and issued Ext.P1 cheque; but the same was dishonoured for want of sufficient fund.

3. The accused pleaded not guilty; but he admitted the issuance of the cheque and the signature in the cheque. But, according to him, the cheque was issued as security for a different transaction and no amount is

due to him. After considering the rival pleas, the learned Magistrate found that the complainant had successfully discharged the initial burden of proving, execution and issuance of the cheque; but the accused miserably failed to rebut the presumption under Sections 139 and 118(a) of the N.I. Act. In view of the said finding the learned magistrate found the accused guilty of the offence alleged against him. The appellate court also concurred with the said finding.

4. The learned counsel for the petitioner advanced arguments challenging the concurrent findings of conviction entered and the sentence imposed on the revision petitioner. According to the learned counsel, there was no loan transaction as stated by the complainant and the complainant failed to prove the original transaction for which he claimed the cheque amount as balance amount due to him. Thus there is no probability to give DD for Rs.7,90,000/- on 26.10.2004 and a cheque for Rs.25,000/- on 27.10.2004. Therefore the complainant's case is highly improbable.

5. Per contra, the learned counsel for the 1st respondent advanced arguments to justify the concurrent findings of conviction and sentence. He drew my attention to Exts.X1 and X2 and submits that Exts.X1 and X2 along with Ext.P7 would prove the borrowal of money from the complainant by the accused. According to him, there is no reason to interfere with the findings of the courts below in the absence of any kind of illegality or perversity in the appreciation of evidence.

6. The scope and extent of jurisdiction under Sections 397 and 401 of the Cr.P.C. are very limited and confined to examination of legality, propriety and correctness of the findings of the court below. There is no scope for appreciation of evidence unless it is found that the appreciation of evidence is vitiated by perversity.

7. With this yardstick I have scrutinised the impugned judgment under challenge. Going by the impugned judgment it is seen that the complainant had

produced Exts.X1 and X2, bank account ledger abstract and cheque return memo respectively, to show the entire transaction as alleged by the complainant. After considering Ext.X2 the court below concurrently found that it shows payment of Rs.7,90,000/- on 26.10.2004 and Rs.25,000/- on 27.10.2004. In view of Exts.X1 and X2 I find that there is no illegality or impropriety in the finding that the complainant had established the borrowal of money from him.

8. This Court is not inclined to re-appreciate the probabilities and improbabilities in revisional jurisdiction. Even if two views are possible, this Court cannot substitute the views of this Court in the place of concurrent findings of the courts below. Therefore, the probabilities and improbabilities advanced by the learned counsel for the revision petitioner do not deserve consideration by lack of jurisdiction also. So the only question to be considered is whether the accused has succeeded in rebutting the presumption under Sections 118(a) and 139 of the N.I. Act, which

stood in favour of the complainant.

9. The issuance of the cheque and signature on the cheque are admitted. But, according to the petitioner, the cheque was issued as a security in connection with a different transaction. But no evidence had been adduced to substantiate the said transaction in evidence. It is pertinent to note that the accused did not give a reply to the notice received from the complainant threatening criminal prosecution. As rightly held by the court below, the issuance of a statutory notice on dishonour of a cheque is not an empty formality, but one of the essential ingredients to give rise to cause of action to the payee to file a complaint. In spite of the receipt of the said notice the accused kept silent and he has not offered any explanation regarding the unsustainability of the demand raised against him. If there was any bona fides in the defence contentions, certainly it is unlikely to remain inactive, silent, dumb and mute. Thus, the defence put up belatedly at the evidence stage lacks

bona fides. Failure to send reply notice despite the receipt of notice demanding huge amount speaks volumes. The above view is supported by the decision in Lissy Babu v. ING Vysya Bank [2009 (2) KLT 967]. More over, even if he had issued the cheque as a security, the legal position settled by the Apex Court in **ICDS Ltd. v. Beena Shabeer [2002 (3) KLT 218 (SC)]** is that a cheque issued as a security would fall under the mischief of offence under Section 138 of the N.I. Act, if the same is dishonoured and returned for want of sufficient funds. On an over all appreciation of evidence, I find that there is no perversity in the appreciation of evidence. Consequently, this revision petition will stand dismissed for devoid of merits.

Sd/-
K. HARILAL, JUDGE

okb.