

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 18TH DAY OF SEPTEMBER 2015/27TH BHADRA, 1937

Crl.Rev.Pet.No. 3202 of 2008 ()

AGAINST THE JUDGMENT IN CRL.A 787/2005 of ADDITIONAL SESSIONS
COURT (ADHOC),FAST TRACK COURT NO.I, THRISSUR DATED 11-08-2008

AGAINST THE JUDGMENT IN CC 633/1998 of J.M.F.C.,KUNNAMKULAM
DATED 05-09-2005

REVISION PETITIONER(S)/ACCUSED/APPELLANT:

E.T.JOSE, S/O. THOMAS,
EDAKKALATHUR HOUSE, VELLARAKKAD P.O.,
THALAPPILLY TALUK, THRISSUR DISTRICT.

BY ADVS.SRI.NAGARAJ NARAYANAN
SRI.SAIJO HASSAN

RESPONDENT(S)/COMPLAINANT/RESPONDENTS:

1. K.U.SUNNY, S/O. UKKRU,
KOOTHUR HOUSE, CHIRAMMANENGAD P.O.

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

R2 BY PUBLIC PROSECUTOR SRI.JIBU P.THOMAS
R1 BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ON 18-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

OKB

K.HARILAL, J.

Crl.R.P. No.3202 of 2008

Dated this the 18th day of September, 2015.

O R D E R

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.787/2005 on the files of the Additional Sessions Judge (Ad hoc), Fast Track Court no.I, Thrissur. The above appeal was filed challenging the judgment, whereby the revision petitioner was found guilty of the said offence, passed in C.C.No.633/1998 on the files of the Judicial First Class Magistrate's Court, Kunnampulam. According to the impugned judgment, the revision petitioner stands sentenced to undergo simple imprisonment for one year and to pay a compensation of Rs.2 lakhs to the complainant under Section 357(3) of the Cr.P.C. and in

default, to undergo simple imprisonment for one month more.

2. The complainant's case is that the accused had borrowed an amount of Rs.2 lakhs from him and when he demanded the said amount, the accused issued Ext.P1 cheque for the said amount and on presentation for encashment it was dishonoured and returned for want of sufficient funds. In spite of receipt of notice demanding the cheque amount, he neither paid the same nor sent a reply denying the liability. Thus, he has committed the offence punishable under Section 138 of the N.I. Act.

3. To discharge the initial burden, the complainant was examined as P.W.1 and the bank manager was examined as P.W.2. Exts.P1 to P10 were marked. After evaluating the evidence on record, the courts below concurrently found that the complainant has successfully discharged the initial burden. What remains to be considered is, whether the accused had succeeded in rebutting the presumptions, which stood in favour of the complainant.

4. The accused was examined as D.W.1. In defence, he contended that he had borrowed an amount of Rs.20,000/- from one Hassankutty in 1997 and in order to discharge that liability two blank signed cheques and one blank stamp paper were handed over to that Hassankutty as security. Later, he could not repay interest for the said amount. So, Hassankutty handed over the said cheque to the complainant and the complainant filed the complaint misusing the cheque at the instruction of the said Hassankutty. Apart from mere denial of the complainant's case, while he was in box, no evidence had been adduced to substantiate the defence contention deposed by the accused as P.W.1. As rightly noted by the courts below, no steps were taken to examine the said Hassankutty. In *Kumar Exports v. Sharma Carpets* [2009 (1) KLT 197 (SC)], the Apex Court held that bare denial of the passing of the consideration and existence of debt apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant.

5. In *Mulamoottil Consumer Credit Ltd. v. Sreenivasan* [2006 (4) KLT 543], this Court held that, a mere suggestion in the cross examination that the cheque had been given to some other as blank cheque and the complainant had obtained it from him without the knowledge and consent of the accused and put the date and amount and presented to the bank is not sufficient to rebut the statutory presumption. When the signature is found to be that of the accused, the necessary presumption is that, that cheque had been given in due discharge of a legally enforceable debt. That presumption statutorily available is not in any way stand rebutted without letting in support of evidence in any form. The employee did not have any direct knowledge about the transaction between the company and the accused that centered around the cheque in question is not sufficient for such rebuttal.

6. The learned counsel for the accused submits that the complainant himself admitted that the handwriting in Ext.P1 cheque is that of the said Hassankutty and the same is sufficient to rebut the

presumptions, which stood in favour of the complainant. In my view, even if the handwriting was that of the said Hassankutty, the same was of no consequence at all; because, under Section 138 of the N.I. Act, there is no statutory insistence that the drawer himself must draw the cheque in his own handwriting.

7. In Lillykutty v. Lawrance [2003 (3) KLT 721], this Court held that the mere fact that the payee's name and amount shown are not in the handwriting of the drawer does not invalidate the cheque. No law provides that the body of the cheque has to be written by the drawer only in his own handwriting. What is material is the signature of the drawer only and not the body of the instrument. In view of the above decision, I find no merit in the contention that the handwriting in Ext.P1 cheque is that of Hassankutty. Therefore, the cheque can be presumed to be issued to the said Hassankutty. There is no illegality or impropriety in any of the findings whereby the courts below found the revision petitioner guilty of the

offence under Section 138 of the N.I. Act. I do not find any perversity in the appreciation of evidence from which those findings are arrived at.

8. 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.

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 v. 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 time to pay the compensation, I am inclined to grant three months time to pay the compensation. Similarly, the substantive sentence of imprisonment is reduced and modified to simple imprisonment for one day till rising of the court. Consequently, in supersession of the sentence imposed by the trial court and confirmed by the appellate court, the revision petitioner will stand sentenced as follows:

- i. The revision petitioner shall undergo simple imprisonment for one day till rising of the court.

ii. He shall pay Rs.2,00,000/- (Rupees Two lakhs only) to the 1st respondent as compensation within a period of three months from today, under Section 357(3) of the Cr.P.C.

iii. He shall appear before the Trial Court to suffer substantive sentence of simple imprisonment as ordered above on or before 18.12.2015 with sufficient proof to show payment of compensation.

iv. In default, he shall undergo simple imprisonment for a period of one month.

v. If the revision petitioner had deposited any amount in the trial court, in compliance with the direction of this Court or appellate court, that amount shall be given credit to and the balance alone need be paid as compensation. In that event, the 1st respondent/complainant is allowed to realise such deposit, if any.

The Criminal revision petition is disposed of accordingly.

K. HARILAL, JUDGE

okb.