2023:KER:61128

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

FRIDAY, THE 6TH DAY OF OCTOBER 2023/ 14TH ASWINA, 1945

CRL.REV.PET NO. 844 OF 2011

AGAINST THE JUDGMENT IN CRA 4/2010 OF ADDL.SESSIONS COURT ALAPPUZHA

CC 164/2009 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II(MOBILE),ALAPPUZHA

REVISION PETITIONER/RESPONDENT/COMPLAINANT:

SASIKUMAR,S/O.CHAKRAPANI,
MANNEZHATHU HOUSE, NORTH ARYAD P.O., ALAPPUZHA.

BY ADV SRI.B.PRAMOD

REPONDENTS/APPELLANT/ACCUSED & STATE:

1 USHADEVI, CLERK, KSFE EVENING BRANCH
BOAT JETTY ALAPPUZHA, RESIDING AT SANDEEPAM,
MANNANCHERRY P.O., ALAPPUZHA. 688530.

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

OTHER PRESENT:

SR P.P PUSHPALATHA M K

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 06.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2023:KER:61128

C.R'

ORDER

What's the sentence to be imposed on an accused convicted for the offence under Section 138 of the Negotiable Instruments Act is the question that arises for consideration?

2. The revision petitioner had filed C.C.No.164/2009 before the Court of the Judicial First-Class Magistrate-II, Alappuzha, alleging the first respondent to have committed the offence under Section 138 of the Negotiable Instruments Act('Act' in short). The learned Magistrate convicted the first respondent for the said offence and sentenced her to undergo simple imprisonment for a period of one month and to pay a fine of Rs.25,000/-; and if the fine amount was realised, the same to be paid to the revision petitioner as compensation under Section 357 (1) (b) of the Code of Criminal Procedure (in short, 'Code'). Challenging the judgment, the first respondent filed Crl.A. No.4/2010 before

the Court of the Additional Sessions Judge, Alappuzha. The Appellate Court, by the impugned judgment, upheld the conviction but further reduced the substantive sentence by ordering the first respondent to undergo simple imprisonment for one day (till the rising of the Court) and pay a compensation of Rs.25,000/- and in default to undergo simple imprisonment for a further period of one month.

3. It is aggrieved by the inadequacy of the sentence; the revision petition is filed.

4. Heard; Sri. V. Ayyappadas, the learned Counsel who argued on behalf of Sri.B.Pramod, the learned counsel for the revision petitioner and Smt. Pushpalatha M.K., the learned Senior Public Prosecutor appearing for the 2nd respondent – State.

5. Sentencing is a matter of discretion and is an arduous challenge for a judge. The discretion of sentencing needs to be exercised judiciously, especially when it is not guided by any statute. Sentencing is that stage of the criminal delivery system where the judge decides the punishment of the convict.

It is said that justice knows no friends and has no foes, but the law is to be administered with a hard hand, and justice cannot be diluted for sympathy.

6. In **Soman v. State of Kerala** [(2013) 11 SCC 382], the Honourable Supreme Court elaborating on sentencing policy observed as under:

> "15. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In *State of Punjab* v. *Prem Sagar* [(2008) 7 SCC 550 : (2008) 3 SCC (Cri) 183] this Court acknowledged as much and observed as under: (SCC p. 552, para 2)
>
> "*2*. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines."
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> 16. Nonetheless, if one goes through the decisions of this Court carefully, it would appear that this Court takes into account a combination of different factors while exercising discretion in sentencing, that is proportionality, deterrence, rehabilitation, etc. (See *Ramashraya Chakravarti* v. *State of M.P.* [(1976) 1 SCC 281 : 1976 SCC (Cri) 1] , *Dhananjoy Chatterjee* v. *State of W.B.* [(1994) 2 SCC 220 : 1994 SCC (Cri) 358] , *State of M.P.* v. *Ghanshyam Singh* [(2003) 8 SCC 13 : 2003 SCC (Cri) 1935] , *State of*

Karnataka v. *Puttaraja* [(2004) 1 SCC 475 : 2004 SCC (Cri) 300] , *Union of India* v. *Kuldeep Singh* [(2004) 2 SCC 590 : 2004 SCC (Cri) 597] , *Shailesh Jasvantbhai* v. *State of Gujarat* [(2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499] , *Siddarama* v. *State of Karnataka* [(2006) 10 SCC 673 : (2007) 1 SCC (Cri) 72] , *State of M.P.* v. *Babulal* [(2008) 1 SCC 234 : (2008) 1 SCC (Cri) 188] , *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150])".

7. Chapter XVII was inserted in the Negotiable Instruments Act 1881 by the Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1998) w.e.f. 1.4.1989. Subsequently, by Amending Act 55 of 2002, Section 138 was further amended and now reads as under

"138.Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a)the cheque has been presented to the bank

> within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
>
> (b)the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque,[within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
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> (c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

8. Thus, a person convicted for the offence under Section 138 of the Act is liable to be sentenced with imprisonment for a term which may be extended up to two years or with a fine which may extend to twice the amount of the cheque, or with both.

9. In one of the earliest judgments, prior to the 2002 amendment of Section 138 of the Act, in **Bhaskaran v. Balan** [1999 (3) KLT 440 (SC)], the Hon'ble Supreme Court held as under:

> "30. It is true, if a judicial magistrate of first class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of Rupees five thousand.

> 31. However, the Magistrate in such cases can alleviate the grievance of the complainant by making resort to S.357(3) of the Code. It is well to remember that this Court has emphasized the need for making liberal use of that provision, [Hari Krishan and State of Haryana v. Sukhbir Singh and Ors. JT 1988 (3) SC 11]. No limit is mentioned in the sub-section and therefore, a magistrate can award any sum as compensation. Of course, while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a court of magistrate of first class in respect of a cheque which covers an amount exceeding Rs. 5,000/- the court has power to award compensation to be paid to the complainant.

10. In **Anilkumar vs. Shammy** [2002 (3) KLT 852], this Court laid down guidelines to deal with payment of compensation under Sec.357 (3) of the Code. The relevant paragraphs read as follows:

> "16. Misplaced sympathy cannot also have any place in the criminal adjudicatory process. It would be myopic to assume that the purpose of the Legislature was only to ensure that the payee gets the amount. It is equally the purpose of the Legislature to ensure that account holders make use of their cheques carefully, diligently and with the requisite caution so that the intended healthy commercial morality would prevail in the economy. That cannot be achieved unless the account holders are deterred from callous, indifferent and irresponsible issue of blank cheques to suit their convenience even on the insistence of unscrupulous money lenders. Every cause may have its martyrs and intelligent, humane and compassionate use of the discretion in sentencing by the courts alone can perhaps ensure the interests of justice.
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> **17. I am in these circumstances of the opinion that normally in a successful prosecution under Section 138 of the Negotiable Instruments Act a direction under Section**

> **357 must follow.** If there are sufficient and compelling reasons, the court must specify such reasons in the judgment and then only choose not to invoke the powers under Section 357 of the Criminal Procedure Code. All subordinate courts shall zealously ensure compliance with the above direction".
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> (emphasised)

11. After the 2002 amendment to the Act, the Honourable Supreme Court in **Damodar S. Prabhu v. Sayed Babalal H** [(2010) 5 SCC 663] observed in the following lines:

> "17. In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act [cited from: Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act—Tackling an avalanche of cases (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5]:
>
> **"... Unlike that for other forms of crime, the punishment here (insofar as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.**
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> If we were to examine the number of complaints filed which were 'compromised' or 'settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."
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> **18. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect.** xxx xxx"

(emphasised)

12. Again in **R. Vijayan v. Baby** [(2012) 1 SCC 260], the Honourable Supreme Court held as under:

"17. The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under Section 357(1) (*b*) of the Code. Though a complaint under Section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under Section 357(1)(*b*) of the Code and the provision for compounding the offences under Section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary.

18. Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a "victim" in the real sense, but is a well-to-do

financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine up to twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice".

13. A reading of Chapter XVII of the Act and the laudable object sought to be achieved by the legislation, and its interpretation on the point of sentencing, leaves no room for any doubt that the criminal court while sentencing an accused for the offence under Section 138 of the Act has to keep the compensatory part in mind, which has to be commensurate to the cheque amount and not to exceed twice the amount, so that it can be appropriated towards the

compensation payable to the complainant under Section 357 of the Code.

14. In the present case, even though the learned Magistrate convicted the 1st respondent for the offence under Sec.138 of the Act, when it came to the question of sentence, the 1st respondent was sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.25,000/- on the sole ground that she was a widow. In appeal, matters got further aggravated by the Appellate Court reducing the substantive sentence to one day.

15. The sentence passed by the courts below is against the well-settled principles laid down in the afore-referred precedents, on the misplaced sympathy that the 1st respondent is a widow.

16. On a conspectus of the facts and the law, this Court holds that the sentence imposed by the courts below is flee-bite and grossly inadequate, and warrants interference by this Court by exercising its revisional power.

In the result,

(i) The revision petition is allowed;

(ii) The sentence imposed by the courts below is modified as follows;

(iii) The 1st respondent is sentenced to undergo simple imprisonment for one day (till the rising of the Court) and pay a fine of Rs.1,10,000/-, and in default, to undergo simple imprisonment for three months;

(iv) If the 1st respondent has already deposited any amount pursuant to the orders of the courts below, only the balance amount needs to be deposited;

(v) The 2nd respondent is permitted to deposit the fine within two months from today;

(vi) The 2nd respondent is directed to appear before the Trial Court on 06.12.2023 to undergo the sentence and to pay the fine;

(vii) If the 2nd respondent fails to appear before the Trial Court, the learned Magistrate shall execute the sentence and recover the fine from the 2nd respondent in accordance with law;

(viii) If the fine amount is recovered, the same shall be paid as compensation to the revision petitioner under Sec.357(1) (b) of the Code;

(ix) The execution of the sentence shall stand deferred till 6.12.2023;

(x) The Registry is directed to forward a copy of the order to the Trial Court for compliance.

Sd/-**C.S.DIAS**
JUDGE

rkc/06.10.23