2023:KER:28954

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 25TH DAY OF MAY 2023 / 4TH JYAISHTA, 1945

CRL.REV.PET NO. 474 OF 2022

AGAINST THE JUDGMENT DATED 18.11.2017 CRL.A.NO.98/2016 OF ADDITIONAL SESSIONS COURT-II (SPECIAL), KOTTAYAM

AGAINST THE JUDGMENT DATED 9.5.2016 IN ST 22/2013 OF JUDICIAL FIRST CLASS MAGISTRATE COURT- II, CHENGANACHERRY

REVISION PETITIONER/APPELLANT/ACCUSED:

BINU MATHEW,
AGED 38 YEARS, MUZHIKKAL HOUSE, KARUKACHAL P.O.,
CHANGANACHERRY TALUK, KOTTAYAM DISTRICT.
BY ADV SANIL JOSE

RESPONDENTS/RESPONDENTS/STATE & COMPLAINANT:

1 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682 031.

2 JOBY JOSEPH,
MADANEPALLI ATHIPARAMBIL, PERUMPANACHY P.O.,
CHANGANACHERRY TALUK, KOTTAYAM DISTRICT - 686 536.
BY ADV SRI.JOHNSON P.JOHN

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 25.05.2023 ALONG WITH CRL.R.P. 475 OF 2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 25TH DAY OF MAY 2023 / 4TH JYAISHTA, 1945

CRL.REV.PET NO. 475 OF 2022

AGAINST THE JUDGMENT DATED 18.11.2017 IN CRL.A.NO.99/2016 OF ADDITIONAL SESSIONS COURT-II (SPECIAL), KOTTAYAM

AGAINST THE JUDGMENT DATED 9.5.2016 IN ST 43/2013 OF JUDICIAL FIRST CLASS MAGISTRATE COURT- II, CHENGANACHERRY

REVISION PETITIONER/APPELLANT/ACCUSED:

BINU MATHEW,
AGED 38 YEARS, MUZHIKKAL HOUSE, KARUKACHAL P.O.,
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THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 25.05.2023 ALONG WITH CRL.R.P.NO.474 OF 2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER

Dated this the 25th day of May, 2023

These revision petitions have been filed under Sections 397 and 401 of Code of Criminal Procedure (hereinafter referred as Cr.P.C. for convenience). The revision petitioner in these revision petitions is the sole accused in S.T.No.22/2013 and S.T.No.43/2013 on the files of the Judicial First Class Magistrate Court-II, Changanacherry and he is challenging the judgments in these cases as well as the common judgment in Crl.A.Nos.98/2016 and 99/2016 of the Court of Additional Sessions Judge-II (Special), Kottayam, arising therefrom. The respondents in both cases are the State of Kerala as well as original complainant.

2. I would like to refer the parties in these revision petitions as 'accused' and 'complainant', for convenience.

3. Heard the learned counsel for the accused and the learned counsel for the complainant (2nd respondent) as well as the learned Public Prosecutor, representing State.

4. The short facts of the case are as under:

S.T. Nos. 22/2013 and 43/2013 were instituted by filing separate private complaints on the allegation that cheques for Rs.1,50,000/- and Rs.3,00,000/- issued by the accused for the discharge of a legally enforceable debt got dishonored for want of funds. Even after issuance of legal notice, the amount was not paid and accordingly cognizance was taken and both matters tried together.

5. The trial court secured the presence of accused and complainant for trial and tried the above cases. During trial, PWs 1 and 2 were examined and Exts.P1 to P9 marked on the side of the complainant. After questioning the accused under Section 313(1)(b) of the Cr.P.C., when opportunity was given, DW1 examined and no exhibit marked.

6. Thereafter, the trial court appraised the evidence and finally found that the accused committed offence punishable under Section 138 of the Negotiable Instruments Act (hereinafter referred as 'N.I.Act' for convenience). The accused was sentenced as under:

> "In the result, accused is convicted for the offence under S.138 of Negotiable instruments Act and he is sentenced to simple imprisonment for four

months and fine of Rs.1,50,000/-. In default of payment of fine he shall undergo simple imprisonment for 3 months. If fine amount is realised the same shall be paid to the complainant as compensation under S.357(i)(b) Cr.P.C.

In the result, accused is convicted for the offence under S.138 of Negotiable Instruments Act and he is sentenced to simple imprisonment for six months and fine of Rs.3,00,000/-. In default of payment of fine he shall undergo simple imprisonment for 6 months. If tine amount is realised the same shall be paid to the complainant as compensation under S.357(i)(b) Cr.P.C."

7. The revision petitioner challenged these verdicts of the trial court before the Appellate Court and the learned Additional Sessions Judge dismissed the appeals by a common judgment, after modifying the sentence as under:

In the result, the appeals are allowed in part, confirming the conviction, but modifying the sentence as indicated below:

In Crl.Appeal 98/2016 (S.T.22/2013)

(1) The accused/appellant shall under go imprisonment till rising of the court for the offence u/s 138 of the Negotiable Instruments Act.

(2) The accused/appellant is directed to pay a

fine of Rs.1,50,000 which amount shall be paid as compensation to the complainant/ respondent, if realised, in default of which, the accused/appellant shall undergo simple imprisonment for a period of three months.

(3) The accused/appellant shall appear before the lower court on or before 26.12.2017 to serve the modified sentence hereby imposed, failing which the lower court shall thereafter proceed to take necessary steps to execute the modified sentence hereby imposed.

In Crl.Appeal No.99/2016 (S.T.No.43/2013)

(a) The accused/appellant shall undergo imprisonment till rising of the court for the offence u/s 138 of the Negotiable Instruments Act.

(b) The accused/appellant directed to a fine of Rs.3,00,000/- which amount shall be paid as compensation to the complainant/respondent, if realised, in default of which, the accused/appellant shall undergo simple for a period of six months.

(c) The accused/appellant shall appear before the lower court on or before 26.12.2017 to serve the modified sentence hereby imposed, failing which the lower court shall thereafter proceed to take necessary steps to execute the modified sentence hereby imposed.

8. It is relevant to note that, when the matter was taken for hearing during the month of November, 2022 the parties expressed their willingness to settle the matter and accordingly parties referred for mediation. A mediation agreement was entered with offer to pay Rs.1,00,000/- on or before 02.05.2023 and the balance Rs.2,00,000/- on 02.05.2025 after paying Rs.50,000/-. Since the transaction is of the year 2013 and the compromise appears to be not so convincing, this Court posted these matters on 25.05.2023 to apprise payment of Rs.1,00,000/- as offered as condition No.II in the compromise. Then it is noticed that, out of Rs.1,00,000/- offered to be paid on 02.05.2023, only Rs.50,000/- was paid and the balance payment not effected even today. As per the terms agreed upon, Rs.50,000/- deposited before the Judicial First Class Magistrate Court-II, Changanachery was agreed to be released to the complainant. It is submitted by both sides that, the said amount not so far realised.

9. Since the terms of the agreement is not found to be acceptable to give a quietus to the issue, as submitted by the learned counsel for the complainant in both cases, I am inclined to consider the matters on merits.

10. Even though the learned counsel for the accused/revision petitioner submitted that the evidence given by DW1 is not properly appreciated and therefore the impugned order requires reconsideration.

11. However, the learned counsel for the complainant submitted that appreciation and re-appreciation of evidence is within the domain of the trial court and appellate court and the same were done properly and thereby the concurrent finding of conviction and modified sentence was imposed permitting the accused to pay the amount to protect the interest of the complainant.

12. In fact, either in the grounds of appeals or in the argument advanced by the learned counsel for the accused, nothing substantiated to exercise the power of revision available to this Court to revisit the concurrent verdicts in any manner.

13. In this context, I am inclined to refer the power of revision available to this Court under Section 401 of Cr.P.C. r/w Section 397, which is not wide and exhaustive to re-appreciate the evidence to have a contra finding. In the decision reported in [(1999) 2 SCC 452 : 1999 SCC (Cri) 275], **State of Kerala v. Puttumana Illath Jathavedan Namboodiri**, the Apex Court,

while considering the scope of the revisional jurisdiction of the High Court, laid down the following principles (SCC pp. 454-55, para 5):

> *"5. ..... In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinising the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by reappreciating the oral evidence. ..."*

14. In another decision reported in [(2015) 3 SCC 123 : (2015) 2 SCC (Cri) 19], ***Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke***, the Apex Court held that the High Court in exercise of revisional jurisdiction shall not interfere with the order of the Magistrate unless it is perverse or wholly unreasonable or there is non-consideration of any relevant material, the order cannot be set aside merely on the ground that another view is possible. Following has been laid down in para.14 (SCC p.135) :

> *"14. ..... Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 Cr.P.C is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be*

perverse or untenable in law or is grossly erroneous or glaring unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."

15. The said ratio has been followed in a latest decision of the Supreme Court reported in [(2018) 8 SCC 165], ***Kishan Rao v. Shankargouda***. Thus the law is clear on the point that the whole purpose of the revisional jurisdiction is to preserve power in the court to do justice in accordance with the principles of criminal jurisprudence and, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence had already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the court which would otherwise tantamount to gross miscarriage of justice. To put it otherwise, if there is non-consideration of any relevant materials, which would go to the root of the matter or any fundamental violation of the principle of law, then only the power of revision would be made available.

16. Since, proof of transaction and execution of cheques, are the matters of re appreciation of evidence and this Court cannot look into those aspects, by re-appreciating the evidence, since, power of revision is not so exhaustive to do so.

17. In this matter, the courts below given emphasis to the evidence of PW1 and PW2 to hold that, the transaction as well as the execution of Exts.P2 cheques in both the cases were proved by the complainant. Thereby the benefit of twin presumptions adjudged in favour of the complainant.

18. Law regarding presumption is well settled. In this connection, I would like to refer a 3 Bench decision of the Apex Court in [2010 (2) KLT 682 (SC)], ***Rangappa v. Sri.Mohan***. In the above decision, the Apex Court considered the presumption available to a complainant in a prosecution punishable under Section 138 of the N.I Act and held as under:

> *"The presumption mandated by S.139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat [2008 (1) KLT 425 (SC)] may not be correct. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence*

wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While S.138 of the Act specified a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under S.139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by S.138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under S.139, the standard of proof for doing so is that of

`preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. Accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

19. In the decision reported in [2019 (1) KLT 598 (SC) : 2019 (1) KHC 774 : (2019) 4 SCC 197 : 2019 (1) KLD 420 : 2019 (2) KLJ 205 : AIR 2019 SC 2446 : 2019 CriLJ 3227], ***Bir Singh v. Mukesh Kumar***, the Apex Court while dealing with a case where the accused has a contention that the cheque issued was a blank cheque, it was held as under:

"A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the

cheque is otherwise valid, the penal provisions of S.138 would be attracted. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence."

20. In a latest 3 Bench decision of the Apex Court reported in [2021 (2) KHC 517 : 2021 KHC OnLine 6063 : 2021 (1) KLD 527 : 2021 (2) SCALE 434 : ILR 2021 (1) Ker. 855 : 2021 (5) SCC 283 : 2021 (1) KLT OnLine 1132], ***M/s.Kalamani Tex & anr. v. P.Balasubramanian*** the Apex Court considered the amplitude of presumptions under Sections 118 and 139 of the N.I Act it was held as under:

"Adverting to the case in hand, we find on a plain reading of its judgment that the Trial Court completely overlooked the provisions and failed to appreciate the statutory presumption drawn under S.118 and S.139 of NIA. The Statute mandates that once the signature(s) of an accused on the cheque/negotiable instrument are established, then these `reverse onus' clauses become operative. In such a situation, the obligation shifts upon the

accused to discharge the presumption imposed upon him. Once the 2nd Appellant had admitted his signatures on the cheque and the Deed, the Trial Court ought to have presumed that the cheque was issued as consideration for a legally enforceable debt. The Trial Court fell in error when it called upon the Complainant-Respondent to explain the circumstances under which the appellants were liable to pay.

.....

18. Even if we take the arguments raised by the appellants at face value that only a blank cheque and signed blank stamp papers were given to the respondent, yet the statutory presumption cannot be obliterated. It is useful to cite Bir Singh v. Mukesh Kumar (2019 (1) KHC 774 : (2019) 4 SCC 197 : 2019 (1) KLD 420 : 2019 (1) KLT 598 : 2019 (2) KLJ 205 : AIR 2019 SC 2446 : 2019 CriLJ 3227], P.36., where this Court held that:

> *"Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under S.139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt."*

21. In fact, nothing substantiated in these revision petitions to interfere with the concurrent findings of conviction as well as the modified sentence of imprisonment to the least minimum possible, in any manner.

22. In the result, these revision petitions fails and are accordingly dismissed.

23. The learned counsel for the petitioner sought for six months time to make the payment. However, the learned counsel for the complainant zealously opposed grant of six months on the ground that, the transactions were of the year 2013 and these revision petitions have been filed at a much belated stage, though the Appellate Court's judgment was rendered during 2016. Having considered the rival contentions, I am inclined to grant three months time to the accused from today to pay the fine and to undergo the sentence.

24. Therefore, the revision petitioner/accused is directed to surrender before the trial court on 25.08.2023 to undergo the modified sentence and to pay the fine. If the revision petitioner/accused fails to surrender, as directed, the trial court shall execute the sentence as per law, without fail. The execution of sentence stands deferred till 24.08.2023.

25. It is specifically ordered that, immediately on production of a copy of this order, the learned Judicial First Class Magistrate Court-II, Changanacherry shall release Rs.50,000/- in the name of the complainant without much delay and the payment of compensation as ordered by the learned Additional Sessions Judge-II (Special), Kottayam shall be after reducing the said amount and Rs.50,000/- paid to the complainant directly.

Registry is directed to forward a copy of this order to the trial court for information and compliance within seven days.

Sd/-

A. BADHARUDEEN
JUDGE

SK

APPENDIX OF CRL.REV.PET 474/2022

PETITIONER'S ANNEXURES :

DEPOSITION OF PW1	**CERTIFIED COPY OF THE DEPOSITION OF PW1 IN ST NO.43/2013, JUDICIAL FIRST CLASS MAGISTRATE COURT-II, CHANGANACHERRY**
DEPOSITION OF PW2	**CERTIFIED COPY OF THE DEPOSITION OF PW2 IN ST NO.43/2013, JUDICIAL FIRST CLASS MAGISTRATE COURT-II, CHANGANACHERRY**
DEPOSITION OF DW1	**CERTIFIED COPY OF THE DEPOSITION OF DW1 IN ST NO.43/2013, JUDICIAL FIRST CLASS MAGISTRATE COURT-II, CHANGANACHERRY**

RESPONDENTS' ANNEXURES : NIL

APPENDIX OF CRL.REV.PET 475/2022

PETITIONER'S ANNEXURES :

DEPOSITION OF PW1	**CERTIFIED COPY OF THE DEPOSITION OF PW1 IN ST NO.22/2013, JUDICIAL FIRST CLASS MAGISTRATE COURT-II, CHANGANACHERRY.**
DEPOSITION OF PW2	**CERTIFIED COPY OF THE DEPOSITION OF PW2 IN ST NO.22/2013, JUDICIAL FIRST CLASS MAGISTRATE COURT-II, CHANGANACHERRY**
DEPOSITION OF DW1	**CERTIFIED COPY OF THE DEPOSITION OF DW1 IN ST NO.22/2013, JUDICIAL FIRST CLASS MAGISTRATE COURT-II, CHANGANACHERRY.**

RESPONDENTS' ANNEXURES : NIL