IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 20TH DAY OF SEPTEMBER 2022 / 29TH BHADRA, 1944

CRL.REV.PET NO. 628 OF 2022

AGAINST THE JUDGMENT DATED 13.05.2022 IN CRA 93/2019 OF ADDITIONAL DISTRICT SESSIONS COURT - III, PATHANAMTHITTA (AGAINST JUDGMENT DATED 30.11.2019 IN ST 723/2015 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,PATHANAMTHITTA)

REVISION PETITIONER/APPELLANT/ACCUSED:

SANIL JAMES,
AGED 42 YEARS,
S/O. C.K.JAMES, KAKKAMTHOTTIL HOUSE,
PAYYANAMON PO, KONNI VILLAGE, KONNI TALUK,
PATHANAMTHITTA DISTRICT., PIN – 689691.

BY ADVS.
BIJU .C. ABRAHAM
THOMAS C.ABRAHAM

RESPONDENTS/RESPONDENT & STATE:

1 STATE OF KERALA
REPRESENTED PUBLIC PROCECUTOR, HIGH COURT OF KERALA, KOCHIN, PIN – 682031.

ADDL.2 M.G. SAMUEL, AGED 56 YEARS,
S/O. LATE GEORGE, MANNIL HOUSE, MALLASSERI PO,
PRAMADOM VILLAGE, PATHANAMTHITTA DISTRICT,
PIN – 689 646.

(ADDL.R2 IMPLEADED AS PER ORDER DATED 06.09.2022 IN CRL.M.A.NO.4/22 IN CRL.R.P FILING NO.644/2022)

BY ADVS.
PUBLIC PROSECUTOR SRI RENJIT GEORGE
BIJU C ABRAHAM
FOR ADDL.R2 SRI M.V.S.NAMPOOTHIRY

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 14.09.2022, THE COURT ON 20.09.2022 DELIVERED THE FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

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Crl.R.P.No.628 of 2022

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Dated this the 20th day of September, 2022

O R D E R

This is a Revision Petition filed under Section 397 and 401 of the Code of Criminal Procedure challenging conviction and sentence imposed against the revision petitioner as per judgment dated 30.11.2019, who is the sole accused in S.T.No.723/2015 on the file of the Judicial First Class Magistrate-II, Pathanamthitta, confirmed by the Additional Sessions Judge-III, Pathanamthitta as per judgment in Crl.Appeal No.93/2019 dated 13.05.2022. The respondents in this revision petition are State of Kerala represented by Public Prosecutor as well as the original complainant before the trial court.

2. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

3. I shall refer the parties in this Revision Petition as `complainant' and `accused' for convenience.

4. Shown off unnecessary embellishments, the case put up by the complainant/the 2nd respondent herein before the court below is as under:

It is alleged by the complainant that the accused borrowed Rs.3,50,000/- from the complainant as loan and issued a cheque dated 02.03.2014 for the said sum with assurance of encashment. But when the cheque was presented for collection, the same was dishonoured for want of sufficient funds. Though legal notice intimating the dishonour and demanding the amount covered by the cheque was issued and accepted by the accused, he did not pay the amount. Accordingly, the complainant lodged the prosecution under Section 138 of the Negotiable Instruments Act.

5. The trial court secured the presence of the accused for trial and evidence was recorded. The complainant got examined as PW1 and Exts.P1 to P7 were marked.

6. After examination of the accused under Section 313(1) (b) of Cr.P.C, though opportunity was provided to the accused to adduce defence evidence, no defence evidence was adduced.

7. On appreciation of the evidence, the trial court convicted and sentenced the accused to undergo simple imprisonment for a period of one year and to pay compensation of Rs.3,50,000/- to the complainant under Section 357(3) of Cr.P.C and in default of payment of compensation, to undergo simple imprisonment for a period of one year. On appeal, the learned Sessions Judge also confirmed the said conviction and sentence on re-appreciation of the evidence.

8. Though the learned counsel for the revision petitioner argued to unsettle the concurrent verdicts entered into by the trial

court as well as the appellate court, finally he conceded that the revision petitioner/accused will be satisfied with modification of sentence to one for a day till rising of court and payment of compensation. Further he submitted that 8 months' time may also be granted to pay the compensation.

9. It is the settled law that power of revision available to this Court under Section 401 of Cr.P.C r/w Section 397 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. ..."

10. 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."

11. 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 or fundamental violation of the principle of law, then only the power of revision would be made available. In this case, as I have already pointed out, the trial court as well as the appellate court rightly appreciated the evidence given by PW1 supported by Exts.P1 to P7 to prove that the accused herein issued Ext.P1 cheque after availing loan of Rs.3,50,000/-. Thereby the complainant proved his initial burden entitling him to get the benefit of presumptions under Sections 118 and 139 of the N.I Act. The defence case that has been put up during cross examination of PW1 is that the cheque was given as security and later it was filled up by the accused and foisted the case. But no evidence is adduced to substantiate this contention. In this connection, it is relevant to refer the law regarding presumptions.

12. In this connection, I would like to refer a 3 Bench decision of the Apex Court in [2010 (2) KLT 682 (SC)], ***Rangappa v. Mohan***. In the above decision, the Apex Court considered the presumption available to a complainant in a prosecution 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."

13. 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."

14. 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], ***Kalamani Tex (M/s.) & 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."*

15. Thus the law is clear on the point that when the complainant discharged the initial burden to prove the transaction led to execution of the cheque, the presumption under Sections 118 and 139 of the N.I Act would come into play. No doubt, these

presumptions are rebuttable and it is the duty of the accused to rebut the presumptions and the standard of proof of rebuttal is nothing but preponderance of probabilities.

16. It has been settled in law that the accused can either adduce independent evidence or rely on the evidence tendered by the complainant to rebut the presumptions. In the case on hand, it appears that the accused did not adduce any evidence. Though during cross examination of PW1 issuance of blank cheque and subsequent filling up of the same were suggested, the said suggestions were denied by the complainant. This defence case cannot succeed even otherwise following the ratio in ***Kalamani Tex (M/s.) & anr. v. P.Balasubramanian*** (*supra*). Apart from the said suggestion, no positive evidence to rebut the presumption either adduced or available in this case. Therefore, it has to be held that the courts below rightly convicted the accused under Section 138 of the N.I Act.

17. Coming to sentence, the trial court imposed sentence to undergo simple imprisonment for a period of one year and to pay a compensation of Rs.3,50,000/- (Rupees Three lakh fifty thousand only) to the complainant under Section 357(3) of Cr.P.C and in default of payment of compensation, to undergo simple imprisonment for a further period of one year and the same was confirmed as such. It is noticed that the trial court imposed imprisonment and ordered to pay compensation of Rs.3,50,000/- under Section 357(3) of Cr.P.C.

18. As per Section 64 of the IPC, in every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable [with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of

payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence. In the decision reported in [2013(4) KHC 163 : 2013 (4) KLT 350 : 2014 ACD 47 : 2014 CriLJ 179 : AIR 2014 SC 771 : 2013 (16) SCC 465], ***Somnath Sarkar v. Utpal Basu Mallick & anr.*** while dealing with provisions to levy fine in offences under Section 138 of the N.I Act, it has been observed thus:

> *"First and foremost is the fact that the power to levy fine is circumscribed under the statute to twice the cheque amount. Even in a case where the Court may be taking a lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. That statutory limit is inviolable and must be respected. It is only when the Court has determined the amount of fine that the question of paying compensation out of the same would arise. This implies that the process comprises two stages. First, when the Court determines the amount of fine and levies the same subject to the outer limit, if any, as is the position in the instant case. The second stage comprises invocation of the power to award compensation out of the amount so levied. The High Court does not appear to have followed that*

process. It has taken payment of Rs.80,000/- as compensation to be distinct from the amount of fine it is imposing equivalent to the cheque amount of Rs.69,500/-. That was not the correct way of looking at the matter. Logically, the High Court should have determined the fine amount to be paid by the appellant, which in no case could go beyond twice the cheque amount, and directed payment of compensation to the complainant out of the same."

19. Section 357 of Cr.P.C dealing with order to pay compensation provides as under:

"357 : Order to pay compensation : (1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied--

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a civil court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or

cheating or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an appellate court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."

20. As per mandate of Section 357 (1)(b) of Cr.P.C, when the court imposes sentence of fine or a sentence of which fine forms a part, the court may when passing judgment, order the whole or part of the fine to be paid as compensation for any loss or

injury caused by the offence, when compensation, is, in the opinion of the court, recoverable by such person in a civil court. Section 357(3) of Cr.P.C provides that when a court imposes a sentence of which fine does not form a part, the court may when passing judgment or order by way of compensation, such amount, as may be specified in the order to the person who has suffered any loss or injury by reasons of the act or accused has been so sentenced. Punishment provided for commission of offence under Section 138 of the N.I Act includes imprisonment for a period, which may extend to 2 years or with fine which may extend twice the amount or with both. Thus in an offence under Section 138 of the N.I Act when the court imposes imprisonment and fine, fine forms part of the sentence. In such cases, the court has to order payment of compensation from the amount of fine as provided under Section 357(1)(b) of Cr.P.C. In view of the matter, the sentence is liable to be modified.

21. In the result:

(i) This Revision Petition is allowed in part;

(ii) The conviction imposed by the trial court as well as the appellate court stands confirmed;

(iii) The sentence stands modified as under:

(a) The revision petitioner/accused shall undergo simple imprisonment for a day till rising of the court for the offence under Section 138 of the N.I Act and also to pay fine of Rs.3,50,000/- (Rupees Three lakh fifty thousand only). In default of payment of fine, the revision petitioner shall undergo default imprisonment for a period of six months. Fine shall be given to the complainant as compensation under Section 357(1)(b) of Cr.P.C.

(b) Considering the request of the accused/revision petitioner, six months' time from today is granted to pay the compensation.

(c) Therefore, the revision petitioner is directed to appear

before the trial court on or before 20.03.2023 to undergo the modified sentence and to pay fine. In default to do so, the trial court is directed to execute the sentence as per law without fail.

(d) The execution of the sentence shall stand deferred till 19.03.2023.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/