**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR. JUSTICE A. BADHARUDEEN**

**WEDNESDAY, THE 19TH DAY OF OCTOBER 2022 / 27TH ASWINA, 1944**

**CRL.REV.PET NO. 624 OF 2022**

**AGAINST THE JUDGMENT DATED 08.07.2022 IN CRA 39/2019 OF ADDITIONAL SESSIONS COURT-I, THIRUVANANTHAPURAM**

**ST NO.10000/2011 OF JUDICIAL MAGISTRATE OF FIRST CLASS-IV (MOBILE COURT), THIRUVANANTHAPURAM**

**REVISION PETITIONER/APPELLANT/ACCUSED:**

**M. SHABEER,**
**AGED 61 YEARS,**
**S/O. MOHAMMED SALI,**
**FLAT NO. 8 - B, HEERA DELE,**
**JAGATHY POST, THIRUVANANTHAPURAM - 695014**
**BY ADV ANN SUSAN GEORGE**

**RESPONDENTS/COMPLAINANT AND STATE :**

1 **ANITHA BAJEE**
**AGED 60 YEARS**
**W/O. BAJEE GOVINDAN, I - A,**
**MUTHOOT GREEN VALLEY MIST,**
**KRISHNA NAGAR,**
**LANE - II, PEROORKADA,**
**THIRUVANANTHAPURAM - 695005**

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

**BY SRI.RENJIT GEORGE, SR.PUBLIC PROSECUTOR**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07.10.2022, ALONG WITH CRL.REV.PET.625/2022, THE COURT ON 19.10.2022 DELIVERED THE FOLLOWING:**

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR. JUSTICE A. BADHARUDEEN**

**WEDNESDAY, THE 19TH DAY OF OCTOBER 2022 / 27TH ASWINA, 1944**

**CRL.REV.PET NO. 625 OF 2022**

**AGAINST THE JUDGMENT DATED 08.07.2022 IN CRA 40/2019 OF ADDITIONAL SESSIONS COURT-I, THIRUVANANTHAPURAM**

**ST NO.10000/2011 OF JUDICIAL MAGISTRATE OF FIRST CLASS-IV (MOBILE COURT), THIRUVANANTHAPURAM**

**REVISION PETITIONER/APPELLANT/ACCUSED:**

**M. SHABEER,**
**AGED 61 YEARS,**
**S/O. MOHAMMED SALI,**
**FLAT NO. 8 - B, HEERA DELE,**
**JAGATHY POST, THIRUVANANTHAPURAM - 695014**
**BY ADV ANN SUSAN GEORGE**

**RESPONDENTS/COMPLAINANT AND STATE :**

1 **ANITHA BAJEE,**
**AGED 60 YEARS**
**W/O. BAJEE GOVINDAN,**
**I - A, MUTHOOT GREEN VALLEY MIST,**
**KRISHNA NAGAR,**
**LANE - II, PEROORKADA,**
**THIRUVANANTHAPURAM - 695005**

2 **THE STATE OF KERALA,**
**REPRESENTED BY THE PUBLIC PROSECUTOR,**
**HIGH COURT OF KERALA,**
**ERNAKULAM – 682031**

**BY SRI.T.R.RENJITH, SR.PUBLIC PROSECUTOR**

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 07.10.2022, ALONG WITH CRL.REV.PET.624/2022, THE COURT ON 19.10.2022 DELIVERED THE FOLLOWING:**

**"*C.R*"**

***A. BADHARUDEEN, J.***

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*Crl.R.P.Nos.624 and 625 of 2022*

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*Dated this the 19th day of October, 2022*

***O R D E R***

These Revision Petitions, filed under Section 397 and 401 of the Code of Criminal Procedure (hereinafter referred to as `Cr.P.C' for short), are at the instance of the accused in S.T.No.10000/2011 and 10001/2011 on the files of the Judicial First Class Magistrate Court-IV (Mobile Court), Thiruvananthapuram. The respondents herein are the original complainant as well as the State of Kerala.

2. Heard the learned counsel for the revision petitioner and the learned Public Prosecutor. Notice to the 1st respondent in both the revision petitions stands dispensed with.

3. I shall refer the parties in these revision petitions as `complainant' and `accused' for convenience.

4. In these matters, the complainant launched prosecution alleging commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (`N.I Act' for short) by the accused, consequent to dishonour of 2 cheques issued by the accused for Rs.1,50,000/- and Rs.75,000/- in partial discharge of the liability towards the complainant and her husband starting from 1997. The specific case put up by the complainant is that when the above cheques were presented for collection, the same got dishonoured for want of funds. Although notice demanding the amounts covered by the cheques were issued to the accused, he did not pay the amount. Therefore, the complainant initiated proceedings under Section 142 of the N.I Act alleging commission of offence punishable under Section138 of the N.I Act by 2 separate proceedings numbered as S.T.No.10000/2011 (pending for cheque for Rs.1,50,000/-) and S.T.No.10001/2011 (pending for cheque for Rs.75,000/-).

5. The trial court secured the presence of the accused and tried both the cases together. The evidence was confined to PW1, PW2 and Exts.P1 to P15 on the side of the complainant. No

evidence adduced at the instance of the accused.

6. On appreciation of the evidence in S.T.10000/2011, the trial court imposed sentence to undergo imprisonment till the rising of the court and to pay fine of Rs.1,50,000/- together with interest @ 9% per annum from 23.04.2008 i.e. the date of dishonour of Ext.P7 till entire realization in full under Section 138 of Negotiable Instruments Act, 1881. In default of payment of fine, accused shall undergo simple imprisonment for a period of three months. The fine amount, if realised, shall be paid as compensation to the complainant under Section 357(1) Cr.P.C. In S.T.10001/2011 the accused is sentenced to undergo imprisonment till the rising of the court and fine of Rs.75,000/- together with interest @ 9% per annum from 21.04.2008 i.e. the date of dishonour of Ext.P6 till entire realization in full under Section 138 of Negotiable Instruments Act, 1881. In default of payment of fine, accused shall undergo simple imprisonment for a period of two months. The fine amount, if realised, shall be paid as compensation to the complainant under Section 357(1) Cr.P.C.

7. Challenging the said conviction and sentence, the accused filed Crl.Appeal No.39/2019 and Crl.Appeal No.40/2019 before the Sessions Court, Thiruvananthapuram. The learned Principal Sessions Judge heard the appeals and concurred with the findings entered into by the trial court as per common judgment dated 08/07/2022. While challenging the concurrent verdicts of the courts below, it is argued by the learned counsel for the accused/revision petitioner that the trial court as well as the appellate court failed to appreciate and re-appreciate the evidence and the complainant failed to prove the case beyond reasonable doubt. It is contended further that the trial court failed to appreciate the defence case put up by the accused. Another contention raised is that there is no legal notice in this case. Therefore, the conviction and sentence require interference.

8. It is pertinent to note that the learned counsel for the accused pointed out an anomaly in the matter of legal notice which can be addressed by this Court by exercising power of revision. However, he failed to point out any other anomaly in the common

judgment of the trial court as well as the common judgment of the appellate court in any manner so as to have interference by this Court by invoking power of revision provided under Sections 357 and 401 of Cr.P.C. In fact, the challenge is confined to failure on the part of the courts below to appreciate and re-appreciate the evidence, except the issuance of legal notice.

9. The power of revision available to this court is no more *res-integra*. 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. ..."*

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 question of law or fundamental violation of the principle of law, then only the power of

revision would be made available.

12. On perusal of the judgment of the trial court it could be gathered that the trial court given emphasis to the evidence of PW1 and PW2 and Exts.P1 to P15 to hold that the complainant discharged his initial burden in the matter of transaction led to execution of Exts.P6 and P7 cheques for the consideration shown therein.

13. However, the question as to whether there is proper legal notice as mandated under Section 138(b) of the N.I Act is a matter to be considered in this case. In fact, before the trial court as well as before the appellate court, want of details in the notice issued under Section 138(b) was pointed out to non-suit the complainant. The decision of this Court reported in [ILR 2016 (4) Ker. 643], ***Divakaran K.K v. State of Kerala & anr.*** had been pressed into before the trial court, in this regard. However, the trial court relied on the decision of the Apex Court reported in [(1999) 8 SCC 221], ***Central Bank of India & Another v. M/s.Saxons Farms & Others,*** and negatived the contention on the finding that Exts.P10 and P14 notices issued to the accused contained the demand mandated by the

statute. The appellate court also negatived the said contention relying on the decision reported in [2021 (2) KHC 432], ***K Basheer v. C.K. Usman Koya & Others***, whereby the ratio of ***Divakaran'***s case (*supra*) was overruled. In fact, in ***Central Bank of India***'s case (*supra*) the Apex Court categorically held that the notice contemplated under Section 138(b) of the N.I Act is a demand of the amount, covered by the cheque on getting back the cheque as unpaid. In this case the courts below rightly held that there was proper demand within the mandate of Section 138(b) of the N.I Act. Hence this challenge is found to be unsustainable.

14. Apart from that, the accused raised the contention before the courts below that he did not execute the cheques. But PW1 categorically given evidence supporting the execution. Apart from that the courts below relied on evidence of PW2, who had given evidence that Exts.P6 and P7 cheques were issued by the accused as deposed by PW1 and the cheques were filled by PW2 and the signatures were put by the accused.

15. In this matter, the evidence of PW1 as regards to financial

liability and consequential issuance of Exts.P6 and P7 cheques found to be convincing by the courts below and thereby the courts below given benefit of twin presumptions under Sections 118 and 139 of the N.I Act, when the evidence adduced by the accused to rebut the presumptions found to be not adequate.

16. In this connection, I would like to refer a 3 Bench decision of the Apex Court reported 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 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."*

17. 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."*

18. 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."*

19. 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 presumptions 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.

20. 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.

21. Therefore, it has to be held that in this case there is nothing to interfere with the concurrent findings entered into by the courts below by exercising the revisional power of this Court and therefore, the conviction entered into by the trial court and confirmed by the appellate court, does not require any interference in any manner.

22. In the matter of sentence, an anomaly committed by the trial court was not even noticed by the appellate court, while granting interest @ 9% per annum from 23.04.2008 onwards. In this connection it is relevant to refer the decision of the Apex Court reported in [2012 (1) SCC 260 : AIR 2012 SC 528 ], ***R. Vijayan v. Baby & anr.,*** where the Apex Court held in para.16 that *in all cases of conviction, uniformly exercise the power to levy fine upto 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.* It was further held that *one other solution is a further amendment to the provision of Chap.17 so that in all cases where there is a conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum interest, followed by award of such sum as compensation from the fine amount. This would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of Chap.17 of the Act, which is to increase the credibility of the instrument. This is however a matter for the Law Commission of*

*India to consider*. So far, no amendment brought into the Statute.

23. In this connection, a vital question arises is : can a Court grant amount more than twice the amount of the cheque as fine ? In order to answer this query, reference to Section138 of the N.I Act is apposite. The punishment provided for commission of offence under Section 138 of the N.I Act is imprisonment for a term which may extend to 2 years or with fine, which may extend to twice the amount of the cheque or with both. Thus the statutory provision is clear that the maximum fine shall be twice the amount of the cheque and nothing more. So, a blanket order, as in a civil case, directing the accused to pay fine amount along with interest @ 9% per annum for the principal cheque amount if exceeds at the time of payment, in excess of double the cheque amount, the said course of action is not permitted under law and courts must ensure that while ordering payment of fine, the same shall not exceed double the cheque amount. Say, for example, in this particular case, interest @ 9% per annum for Rs.1,50,000/- if calculated, as ordered by the trial court as well as appellate court @ 9%, Rs.13,500/- is the annual interest. If

the amount is calculated from 23.04.2008 upto 22.04.2022, the same would come to (13,500 X 14) Rs.1,89,000/-. Thus the amount of fine as on 22.04.2022 would come to Rs.3,39,000/-. That is, the fine amount would go beyond the limit of double the cheque amount as on 22.04.2022 itself. It will go on accumulating till the date of payment or realisation. The statute does not provide such accumulation beyond twice the cheque amount. Therefore, in order to avoid payment of fine more than double the cheque amount, which is impermissible as per Section 138 of the N.I Act, the trial court should quantify the amount to a definite sum calculating interest @ 9% per annum following the ratio in ***Vijayan***'s case, without exceeding twice the cheque amount, (*supra*) and the said amount shall be imposed as fine. In view of the matter, I am inclined to modify the sentence, so as to maintain the same within the statutory limit. Accordingly, the sentence stands modified as under:

(a) In S.T.No.10000/2011, while confirming the substantive sentence imposed by the trial court and confirmed by the appellate court against the accused for a day till rising of the court, the

revision petitioner/appellant is directed to pay Rs.3 lakh as fine amount and fine, if paid or realised, that shall be given as to the 2nd respondent/complainant as compensation under Section 357(1)(b) of Cr.P.C. In default of payment of fine, the accused shall undergo default sentence of imprisonment for a period of 4 months;

(b) In S.T.No.10001/2011 while confirming the substantive sentence imposed by the trial court and confirmed by the appellate court against the accused for a day till rising of the court, the revision petitioner/appellant is directed to pay Rs.1,50,000/- (Rupees One lakh fifty thousand only) as fine amount and fine, if paid or realised, that shall be given to the 2nd respondent/complainant as compensation under Section 357(1)(b) of Cr.P.C. In default of payment of fine, the accused shall undergo default sentence of imprisonment for a period of 2 months.

24. The Revision Petitions stand allowed in part as above.

25. Considering the request made by the learned counsel for the revision petitioner, one months' time from today is granted to the revision petitioner to pay the fine and to undergo the sentence

imposed by the appellate court and modified by this Court as above. The revision petitioner shall appear before the trial court on 18.11.2022 to pay the fine and to undergo the sentence.

26. If the revision petitioner/accused fails to appear before the trial court as directed above, the trial court is directed to execute the sentence without fail.

27. Therefore, the execution of sentence shall stand deferred till 17.11.2022.

The Registry shall forward a copy of this order to the trial court and the appellate court and all other criminal courts in the State to comply the directions in this order in the matter of calculation of interest for the purpose of imposing fine.

Sd/-

***(A. BADHARUDEEN, JUDGE)***

*rtr/*