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

**PRESENT:**

**THE HONOURABLE MR. JUSTICE P.D.RAJAN**

**WEDNESDAY, THE 29TH DAY OF JULY 2015/7TH SRAVANA, 1937**

**CRL.A.No. 426 of 2004 ( )**
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**AGAINST THE ORDER IN CC 317/2002 of C.J.M.PATHANAMTHITTA**
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**APPELLANT(S)/COMPLAINANT:**
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**GANESH RAO, THUMARAPARAMPIL HOUSE,**
**KUMBAZHA NORTH, MYLAPRA, PATHANAMTHITTA.**

**BY ADV.V.PHILIP MATHEWS**

**RESPONDENT(S)/ACCUSED AND STATE:**
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1. **ASHOK SING T.G., THANNIKUZHIYIL,**
   **MUNDUKOTTACKAL P.O., PATHANAMTHITTA.**

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

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 29-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

**P.D. RAJAN, J.**

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**Crl.Appeal 426 of 2004**

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**Dated this the 29th day of July, 2015**

**JUDGMENT**

The appellant who is the de-facto complainant in C.C.317/2002 of Chief Judicial Magistrate, Pathanamthitta challenges the order of acquittal for offence punishable under section 138 of the Negotiable Instruments Act.

2. The facts necessary for the indictment in the trial court were that the first respondent borrowed a sum of Rs.26,200/- from him and in discharge of that debt, he issued Ext.P1 cheque drawn on Canara Bank, Pathanamthitta branch. When it was presented for encashment through South Indian Bank, Mylapra, it was returned for the reason of 'funds insufficient' in the account of the first respondent. A notice was issued to the first respondent demanding to pay the due amount. Even after receipt of that notice, first respondent failed to make the payment. In the circumstance the above complaint was filed in the trial court.

3. To prove the allegation, appellant was

examined as PW1 and his documents were marked as P1 to P6. The incriminating circumstances brought out in evidence were denied by the first respondent while questioning him. The first respondent examined DW1 and marked Ext.D1. The trial court after sifting and weighing the evidence on record, acquitted the first respondent.

4. The learned counsel appearing for the appellant contended that Ext.P1 was issued in discharge of a debt and the presumption under Section 139 of the Negotiable Instruments Act will attract in this case. The oral testimony of DW1 and Ext.D1 itself is not sufficient to rebutt the presumption.

5. According to Section 138 of N.I. Act, when a cheque is 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 is an offence under the Act. The appellant was examined as PW1 in the trial court. His oral evidence shows that Ext.P1 was issued in discharge of a debt. He gave that amount by pledging his wife's ornaments in the bank. The first respondent utilised that amount for his daughter's marriage. When Ext.P1 was presented for encashment, it was dishonoured for the reason of 'funds insufficient' and statutory formalities were complied by him. There is no dispute with regard to that aspect. When PW1 discharged his initial burden, a presumption under Section 139 of the N.I. Act will attract in favour of the holder of the cheque.

6. The first respondent in the trial court contended that the cheque was issued as a security in connection with a loan transaction at the Co-operative Bank, Mylapra. DW1 deposed that the wife of the $I^{st}$ respondent borrowed a sum of Rs.30,000/-, for which appellant stood as a surety, at that time cheque was issued to the appellant as a security. When it was defaulted by DW1, appellant's

salary was attached. First respondent also produced Ext.D1, which is the copy of a registered notice issued from the bank, with regard to the bank loan. DW1 categorically stated that one Subaida Beevi and appellant were the surties in that loan transaction. Apex Court in **Narayana Menon v. State of Kerala (2006 (3) KL*T 404)*** held that the accused is only to discharge the initial onus of proof and he is not required to disprove the prosecution case, when that initial burden has been discharged the burden shifts and the presumption disappears. It reads thus:

> “Applying the said definitions of 'proved' or 'disproved' to principle behind S.118(a) of the Act, the Court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for

> the said purpose, the evidence adduced on behalf of the complainant could be relied upon. The standard of proof evidently is pre-ponderance of probabilities. Inference of pre-ponderance of probabilities can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies. It was for the Appellant only to discharge initial onus of proof. He was not necessarily required to disprove the prosecution case. Whether in the given facts and circumstances of a case, the initial burden has been discharged by an accused would be a question of fact. It was matter relating to appreciation of evidence. The High Court in its impugned judgment did not point out any error on the part of the appellate court in that behalf. If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a '*fortiori*' even an accused need not enter into the witness box and examine other witnesses in support of his defence. He, it will bear repetition to state, need not disprove the prosecution case in its entirety as has been held by the High Court."

7. The evidence of DW1 and Ext.D1 was considered by the trial court. In the absence of specific evidence with regard to discharge of debt or liability, the trial court rightly acquitted

the first respondent. I find no illegality in the above order and there is no merit in this appeal and it is dismissed accordingly.

Sd/-
**P.D. RAJAN,**
**JUDGE**

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P.A. TO JUDGE