IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 28TH DAY OF JULY 2015/6TH SRAVANA, 1937

CRL.A.No. 820 of 2006 ( )

AGAINST THE JUDGMENT IN Crl.Appeal 458/2004 of ADDL SESSIONS COURT-I,MAVELIKKARA DATED 17.11.2005

AGAINST JUDGMENT IN CC 132/2001 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, HARIPAD DATED 2.8.2004

APPELLANT(S)/IST RESPONDENT/COMPLAINANT:

K.P.SUMANGALAMMA, KARAKKATTU VEEDU,
ERIKKAVU, KARTHIKAPPALLY P.O.

BY ADVS.SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT(S)/APPELLANT/ACCUSED AND STATE:

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1. S.KRISHNA KUMAR, S/O.S.S.RAJAN, MANGALATHU, THAMALACKAL NORTH, KUMARAPURAM VILLAGE, THAMALLACKAL P.O., KARTHIKAPPILLY TALUK, ALAPPUZHA DISTRICT.

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

BY PUBLIC PROSECUTOR SMT. SEENA RAMAKRISHNAN -FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.Appeal No.820 of 2006

Dated this the 28th day of July, 2015

JUDGMENT

The appellant challenges the judgment of acquittal of the first respondent in Crl.Appeal No.458/2004 on the file of the Additional Sessions Court-I, Mavelikkara, u/s. 138 of the Negotiable Instruments Act. Appellant filed a complaint, C.C.No.132/2001 in the Judicial First Class Magistrate-II, Haripad against the accused/1st respondent u/s.138 of the Negotiable Instruments Act, he was convicted and sentenced to undergo simple imprisonment for six months. Against that, accused/1st respondent preferred Crl.Appeal No.458/2004 in the Additional Sessions Court, Mavelikkara, which was allowed by that Court.

2. The facts necessary for the indictment in the trial Court were that the 1st respondent borrowed a sum of ₹2 lakhs from the appellant on 30.1.2001 and in discharge of that debt, he issued a cheque drawn on Canara Bank, Haripad Branch. When it was presented for encashment, it was dishonoured for the reasons of 'funds insufficient'. After that, he sent a lawyer notice to the 1st respondent stating about the dishonour of cheque. There was no repayment of the amount, after receipt of the notice. Hence, the above complaint was filed in the trial Court. To prove the allegation, the defacto complainant examined PW1 and 2 in the trial Court. He also produced Exts.P1 to P11 as documentary evidence. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. The 1st respondent examined Dws 1 to 3 and marked Exts.D1 to D7 as

documentary evidence. The trial Court, after analysing the evidence, convicted the accused. Hence the appeal.

3. The learned counsel appearing for the appellant contended that there was legally enforceable debt, which was proved by PW1 in the trial Court. A wrong appreciation was made by the trial Court and acquitted the accused. The observation that Ext.P1 was given on the basis of compulsion made by the Police, is false. Therefore, a presumption u/s.118 and 139 of the N.I. Act can be drawn in favour of the holder of the cheque. The evidence of DW2 and DW3 are totally silent with regard to the defence version. Therefore, it can be presumed that Ext.P1 was issued in discharge of a debt or liability.

4. According to Section 138 of the Negotiable Instruments Act, 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 offence u/s.138 of the Act. In this context, the oral testimony of PW1 is relevant. His evidence shows that Ext.P1 was issued in discharge of a debt and when it was presented for encashment, it was dishonoured for the reason of 'funds insufficient' . Ext.P2 is the dishonour memo issued from Canara Bank, Hairpad, which shows that Ext.P1 was dishonoured for the reason of 'funds insufficient'. Ext.P3 is the intimation issued from SBT, Haripad branch. The appellant gave a notice to the

1st respondent, after dishonour of Ext.P1 cheque. There was no repayment, after receipt of the above notice. PW2, the Bank Manager deposed that when Ext.P1 was presented for encashment, the amount standing in the credit of the account is insufficient to honour Ext.P1. Analysing the evidence of PW1 and PW2, it is found that Ext.P1 was dishonoured for the reason of funds insufficient and it was issued in discharge of a debt.

5. When appellant proves the existence of a legally enforceable debt, the presumption under Section 139 of the Negotiable Instruments Act starts operating and burden shifts to the accused. Section 139 reads as follows.

> "139. Presumption in favour of the holder - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability".

A three Judge bench of the Apex Court in **Rangappa** v. **Sri Mohan** (2010(11) SCC 441) held as follows:-

> "The presumption mandated by Section 139 includes a presumption and there exists a legally enforceable debt or liability. 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 lliability can be contested. However, there can be no doubt that there is an initial presumption which favours the respondent complainant".

Therefore, in the present case, since the cheque as well as the signature have been accepted by the accused respondent, the presumption under Section 139 would operate.

6. When the cheque is dishonoured on the ground of 'insufficient fund' or any other ground mentioned u/s.138 of the N.I. Act, there is a presumption u/s.139 of the N.I. Act, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to

in section 138 for the discharge, in whole or in part, of any debt or other liability. The 1st respondent examined DW1 to DW3. DW1 is the accused himself, who deposed that Ext.P1 was obtained by the appellant as per the direction of the Haripad Police. DW2 , Asst. Sub Inspector of Police admitted that he received Ext.D7 complaint in the Police Station and that was registered as petition 10/2001, which was disposed on 22.1.2001 directing that the complaint is of civil nature and the parties are at liberty to approach appropriate forum for their relief. DW2 admitted that both parties were summoned in the Police Station. DW3 is the Panchayath member. A close scrutiny of the evidence in Ext.D1 and D7 shows a reasonable probability with regard to the defence version. While questioning u/s.313 Cr.P.C., the 1st respondent admitted that he was a field worker of Surabhi Agro Tech Ltd. and he canvassed the deposits for the institution. He deposed that his wife's sister was residing in a rented house owned by the appellant. The appellant remitted Two lakh rupees in Agro Tech Ltd, for the purpose of employment of her son, who was appointed in the company and she received quarterly interest @10,500/- during June 2001. The first respondent approached the above company on the maturity date of the deposit. Subsequently, on 2.2.01 she filed a complaint before Haripad Police Station and as per the direction, he issued Ext.P1 in the presence of witness. DW2, Assistant Sub Inspector admitted that there was a complaint with regard to the above allegation. Filing of the above complaint in the Police was proved by the first respondent in the trial court, which is a good ground to rebut the presumption under Section 139 of the N.I. Act.

7. In this context the decision of **Narayana Menon**

v. State of Kerala [2006 (3) KLT 404] by the Apex Court is relevant. 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."

8. The principle behind S.118(a) of the Act is that 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 in a case is to raise a probable defence, by the first respondent. For that, the evidence adduced on behalf of the appellant could be relied upon. The standard of proof necessarily is pre-ponderance of probabilities, which can be drawn not only from the materials on record but also by the

circumstances upon which he relies. The 1st respondent has only to discharge initial onus of proof and he is not required to disprove the prosecution case. Coming to the given facts and circumstances of a case, it is found that the initial burden has been discharged by the 1st respondent. When initial burden has been discharged in a case by the accused the burden shifts and presumption disappears.

The appellate Court, after meticulous scanning of the oral and documentary evidence put forward by the accused, framed an opinion that the evidence of DW1 to DW3 is sufficient to rebut the presumption. In the circumstances, the appellate Court observed that the presumption provided u/s.139 of the N.I. Act disappears and the conviction u/s.138 of the N.I. Act was set aside and the 1st respondent was set at liberty. I do not find any illegality in the above order. Therefore, there is no merit in this appeal and it is dismissed accordingly.

P.D. RAJAN, JUDGE.

acd