IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

CRL.A.No. 2347 of 2009 ( )

AGAINST THE JUDGMENT IN CRA 299/2008 of ADDITIONAL SESSIONS JUDGE (ADHOC-1), ERNAKULAM DATED 18-03-2009

AGAINST THE JUDGMENT IN S.T.1153/2004 OF J.F.M.C-I, KOCHI DATED 28.03.2008

APPELLANT(S)/RESPONDENT/COMPLAINANT:

SMT.A.HEMALATHA NAMBIAR
D-4, KENT PARADISE, MAY 1ST ROAD
THAMMANAM P.O., COCHIN-32.

BY ADVS.SRI.DEVAN RAMACHANDRAN
SRI.K.M.ANEESH
SRI.S.NIKHIL SANKAR
SRI.ADARSH KUMAR

RESPONDENT(S)/APPELLANT/ACCUSED AND THE STATE:

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1. M.GOPAKUMAR, S/O.T.CHANDRAN,
AGED 48 YEARS, PATTATHUMADOM, NEAR CHALAI PALAM
CHENDAMANGALAM, N.PARUR, ERNAKULAM DISTRICT.

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

R,R1 BY ADV. SRI.P.VINODKUMAR
R,R1 BY ADV. SRI.SUSHANTH.J.
R, BY ADV. SRI. GITHESH.R., PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

acd

P.D. RAJAN, J.

Crl.Appeal No.2347 of 2009

Dated this the 10th day of June, 2015

JUDGMENT

This appeal is preferred against the judgment in Crl.Appeal No.299/2008 of Additional Sessions Judge (Adhoc-I), Ernakulam for offence punishable u/s.138 of the Negotiable Instruments Act (hereinafter referred to as the 'N.I. Act' for short). The appellant was the complainant in S.T.No.1153/2004 of Judicial First Class Magistrate-I, Kochi for offence punishable u/s.138 of N.I.Act, in which accused was convicted and sentenced to undergo simple imprisonment for six months and to pay a sum of ₹2,50,000/- u/s.357 (3) Cr.P.C. as compensation. Against that, he preferred the above Crl.Appeal No.299/2008 before Sessions Judge, Ernakulam, where the appeal was allowed and the accused was acquitted u/s.138 of N.I.Act.

2. The appellant's case was that in discharge of a debt, the 1st respondent issued a cheque for ₹2,50,000/- dated 3.12.2003 drawn on State Bank of India, Ernakulam branch. When the cheque was presented for encashment, it was dishonoured for the reason of 'funds insufficient'. The appellant demanded for payment of the said amount by giving a notice in writing to the drawer of the cheque. Even after receipt of notice, there was no repayment, hence, the complaint.

3. To substantiate the offence, the appellant examined PW1 and marked Exts.P1 to P5 as documentary evidence. The incriminating circumstances brought out in evidence were denied by the 1st respondent while questioning him u/s.313 Cr.P.C. He examined Dws 1 and 2 in

the trial Court. The trial Court, after sifting and weighing the evidence on record and hearing the parties, convicted the 1st respondent, which was set aside by the appellate Court.

4. The learned counsel appearing for the appellant contended that initial burden of payment of the due amount was properly proved in the trial Court. When that initial burden was discharged by adducing oral and documentary evidence, it is the responsibility of the 1st respondent to rebut the presumption by adducing evidence. The oral testimony of DW1 and documentary evidence in Ext.D1 are not sufficient to disbelieve the evidence of PW1 and to rebut the presumption u/s.139 of the N.I.Act. The amount was given to the 1st respondent from the pensionary benefit received from the Reserve Bank of India, which was cleared in the oral testimony of PW1. A

wrong appreciation was made by the appellate Court and acquitted the 1st respondent.

5. The learned counsel appearing for the 1st respondent contended that the admission made by PW1 itself shows 'lack of consideration'. The normal presumption is that every negotiable instrument was made or drawn for consideration, when it has been accepted. The answers given in cross examination reading with Ext.D1 itself is sufficient to rebut the presumption available u/s.118(a) and 139 of N.I.Act. For that, the 1st respondent need not disprove the case of the appellant. The preponderance of probability available from the evidence of PW1 itself is sufficient to rebut the presumption and no interference is necessary.

6. According to S.138 of the N.I. Act, where any cheque drawn by a person on an account maintained by him

with a bank for payment of any amount and money to another person from out of that account, for the discharge in whole or in part of any debt or liability, is returned by the bank, 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 a bank, such person shall be deemed to have committed an offence under Section 138 of the Negotiable Instruments Act. The cheque has to be presented within the statutory period in which it is drawn or within the period of its validity. Secondly, the payee or holder in due course of the cheque makes a demand for payment of such amount by giving a notice in writing to the drawer of the cheque within the statutory period on the date of receipt of information from the bank regarding the return of the cheque as unpaid.

7. The burden of proof and its impact and the presumption u/s.139 of the N.I. Act were considered by the Apex Court in **Hiten P. Dalal** v. **Bratindranath Banerjee** (2001) 6 SCC 16), which was explained in paragraph 46 of the decision rendered in **Narayana Menon** v. **State of Kerala** [2006(3) KLT 404 (SC)] as follows:

> "In Hiten P. Dalal v. Bratindranath Banerjee ((2001) 6 SCC 16), a 3-Judge Bench of this Court held that although by reason of Ss.138 and 139 of the Act, the presumption of law as distinguished from presumption of fact is drawn, the court has no other option but to draw the same in every case where the factual basis of raising the presumption is established. Pal. J. speaking for a 3-Judge Bench, however, opined:
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> 'Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

> In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,
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> 'after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"

8. The main point to be considered in this case is whether the oral testimony of PW1 is believable with regard to the passing of consideration at the time of execution of Ext.P1. The evidence of PW1 shows that in discharge of a debt, the 1st respondent gave Ext.P1 cheque dated 3.12.2003 and when it was presented for

encashment it was dishonoured. She stated in cross examination that she arranged the money from her pensionary benefit, which was deposited in SBT, M.G. Road branch and the balance in the post office savings bank account. She had withdrawn ₹2,50,000/- from SBT, M.G. Road Branch and gave it to the 1st respondent, but she has not disclosed about how much was deposited in SBT M.G. Road branch and how much deposited in the post office savings bank account. Subsequently, she answered that she is not remembering how much amount was deposited. She also added that the amount was received five years back. She do not remember the actual amount deposited in the bank. She also answered that she deposited some amount in the SBT and the balance amount was retained in her house for purchasing the property. The aforesaid statement shows that she has not a specific case with regard to passing of consideration for drawing a presumption u/s.118 of the N.I.Act.

9. In view of the aforesaid factual events, now the question is whether the presumption u/s.118(a) and 139 of the N.I.Act can be drawn in this case. Section 118 (a) and 139 read as follows:

> "118. Presumptions as to negotiable instruments.- Until the contrary is proved, the following presumptions shall be made:-
> (a) of consideration- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;
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> xxx xxx xxx
>
> 139. Presumption in favour of 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."

10. Applying the definition 'proved' or 'disproved' to principle behind s.118(a) of the N.I.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. For that, the evidence adduced by the complainant in this case can also be relied upon by the 1st respondent, which was done in this case. Ext.D1 shows that there was no deposit as stated by PW1 on the date of alleged transaction. A perusal of Ext.D1 itself is sufficient to rebut the presumption arising out of u/s.118 and 139 of the N.I.Act. The burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact.

11. The basic principle of criminal justice system is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by cogent evidence to prove the guilt of the offence for which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which the statutory presumption arises regarding the guilt of the accused But, even in such circumstances also, the burden is upon the prosecution to prove the existence of facts which are to be present before the Court to draw such presumption. Once those facts are

shown by the prosecution to exist, the Court can raise the statutory presumption against the guilt of the accused. Even in such circumstances also, the accused has a right to rebut such presumption by adducing evidence or otherwise. If some materials are brought on record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to get the benefit of doubt also.

12. The principles of presumptions discussed by the Apex Court in **Narayana Menon's case (supra)**, shows that rebuttal evidence in Ext.D1 was relied by the appellate Court. Non-existence of such consideration raised by the 1st respondent by way of probable defence is relied upon by the appellate Court. If the 1st respondent discharged the initial onus of proof showing that the existence of

consideration was improbable or doubtful, the onus would shift to the appellant, who will be obliged to prove consideration in the manner of facts. When such evidence is not available, the decision taken by the appellate Court is rightly to be upheld. The burden of proof of the 1st respondent in proving the non-existence of consideration can be either direct evidence or by bringing on record the preponderance of probability according to the circumstances of the case, which he relies. I do not find any illegality or irregularity in the order of the Appellate Court and accordingly, I confirm the findings of the Appellate Court.

There is no merit in this appeal and it is dismissed accordingly.

P.D. RAJAN, JUDGE.

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(b) as to date- that every negotiable instrument bearing a date was made or drawn on such date;
(c) as to time of acceptance - that every accepted

bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) as to time of transfer- that every transfer of a negotiable instrument was made before its maturity;

(e) as to order of indorsements- that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) as to stamps- that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that holder is a holder in due course- that the holder of a negotiable instrument is a holder in due course:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."