IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

Crl.Rev.Pet.No. 533 of 2003 ( )

AGAINST THE JUDGMENT IN CRA NO. 327/2002 of THE III ADDITIONAL SESSIONS COURT, ERNAKULAM.
&
AGAINST THE JUDGMENT IN CC NO. 826/1998 of JUDICIAL FIRST CLASS MAGISTRATE COURT-I,ERNAKULAM.

REVISION PETITIONERS/APPELLANT/ACCUSED:

1. BHASKARAN NAIR KANNAN,
   MANAGING PARTNER, M/S. AKASH HOME APPLIANCE,
   MARKET ROAD, CHANGANACHERRY.

2. M/S. AKASH HOME APPLIANCE, MARKET ROAD,
   CHANGANASSERY, REPRESENTED BY ITS MANAGING PARTNER,
   BHASKARAN NAIR KANNAN.

   BY ADV. SRI.G.SUKUMARA MENON

RESPONDENTS/RESPONDENTS/COMPLAINANT:

1. M/S. VIDEOCON INTERNATIONAL LTD.,
   M.G.ROAD, ERNAKULAM REPRESENTED BY ITS ACCOUNTS
   OFFICER, R.C.PILLAI.

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

R BY PUBLIC PROSECUTOR SRI. DHANESH MATHEW MANJOORAN

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 30-09-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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P.D. RAJAN, J.

Crl.R.P.533 of 2003

Dated this the 30th of September, 2015

ORDER

Revision petitioners are the appellants in Crl. Appeal 327/02 on the file of III Additional Sessions Judge, Ernakulam challenges the concurrent findings of conviction under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'Act'). The accused were convicted in C.C.826/98 on the file of the Judicial First Class Magistrate-1, Ernakulam for offence punishable under Section 138 of the Negotiable Instruments Act. The first accused was convicted and sentenced to imprisonment for 3 months and to pay Rs.64,000/- as compensation under Section 357(3) Cr.P.C. The second accused was sentenced to pay a fine of Rs.5000/- and if the fine amount is realized Rs.3000/- shall be disbursed to the complainant under Section 357(1) Cr.P.C.

2. The complainant's case in the trial court was that,

the accused purchased electrical items and home appliance from the complainant's firm worth Rs.63,800/- and in discharge of that liability on 25.10.96, he issued a cheque drawn on Federal Bank Ltd., Chenganacherry branch. When the cheque was presented for encashment it was dishonoured for the reason of funds insufficient. The complainant demanded the due amount by giving a notice in writing to the accused, which was received by the accused and no payment thereafter. In the circumstance, a complaint was filed in the trial court.

3. During trial, complainant examined PW1 and PW2 and marked Exts. P1 to P8 as documentary evidence. The incriminating circumstances brought out in evidence were denied by the accused while questioning him. While cross examination of PW2, Ext.D1 was marked. The trial court after sifting and weighing the evidence on record convicted the accused. Against that they preferred an Appeal, where the conviction was confirmed and the appeal was dismissed. Being aggrieved by that he approached this court with this revision petition.

4. The learned counsel appearing for the revision petitioners contended that they were already paid the amount which was admitted by PW2 in his cross examination. When discharge was admitted by the Power of Attorney Holder, PW2, no debt or liability existing and it is presumed that Ext.P2 was issued not in discharge of a debt or liability.

5. The learned Public Prosecutor submitted that no evidence has been adduced by the revision petitioner to prove the discharge. The admission was made with regard to a bill and not the amount mentioned in Ext.D1 invoice, if that be the position, there is no reason the interfere in the findings of the court below.

6. According to Section 138 of the Negotiable Instruments Act, where any cheque drawn by a person on an account maintained by him with a bank 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 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. This deemed provision is subject to the statutory condition that 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 and non-payment of due amount after receipt of notice by the drawer of the cheque.

7. To prove the allegations in the complaint, Power of Attorney Holder of the complainant was examined as PW1 and Ext.P1 is the copy of Power of Attorney given in his name. Subsequently, he resigned from the firm, and his presence could not be obtained at a later stage. The evidence of PW1 shows that Ext.P2 was issued in discharge of a debt. When it was presented for

encashment it was dishonoured for the reason of funds insufficient. Exts.P3 and P4 are the dishonour memos. The first respondent issued a lawyer notice demanding the due amount. Ext.P5 is the copy of the lawyer notice and Ext.P6 is the acknowledgment card. The first revision petitioner accepted the notice but there was no repayment. When PW1 was recalled invoking 311 Cr.P.C, he could not appear as directed. Therefore, PW2 another person representing the firm was examined as PW2. Analyzing the oral evidence of PW1 and PW2, it is clear that Ext.P2 was issued in discharge of a debt. When Ext.P2 was dishonoured for the reason of funds insufficient, a presumption under Section 139 of the N.I. Act can be drawn in favour of the holder of the cheque.

8. When complainant proves that the cheque was received for the reasons stated under Section 138 of the N.I. Act, 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".

9. The revision petitioner admitted his signature in the cheque. During cross examination of PW2, he marked Ext.D1 invoice. He contended that the entire amount was repaid by way of a bill and it was answered by PW2, if that be, no existing debt. I cannot agree with that contention since answer of PW2 shows that on 25.9.96, there was a transaction and in discharge of that liability, he issued Ext.P2 cheque. PW2 admitted that against the bill for Rs.63,800/- the account was settled by the revision petitioner. But on the transaction of 25.10.96, Ext.P2 cheque was issued. Therefore, it is the responsibility of the revision petitioner to rebut the presumption under Section 139 of the N.I. Act. In the absence of any rebutable evidence, it is presumed that cheque was issued in discharge of a debt. 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 trial court and appellate court concluded that Ext.P2 cheque was issued in discharge of a debt and convicted the revision petitioners. I find no illegality in the above orders. Therefore, the conviction passed by the trial court is only to be confirmed. The trial court sentenced first revision petitioner simple imprisonment for 3 months and pay a compensation of Rs.64,.000/- and second revision petitioner was sentenced to pay a fine of Rs.5000/-, it was also directed that, if fine amount is realized, Rs.3000/- shall be payable to the complainant towards compensation under Section 357(1), which needs modification.

10. The learned counsel appearing for the revision petitioners submitted that the company is no more and in such a situation, sentencing the company is unsustainable in law. Considering the above submission, I sentence the revision petitioners as follows;

The first Revision petitioner is sentenced to imprisonment till rising of court and pay a compensation of Rs.64,000/- under Section 357(3) Cr.P.C. In default of payment of compensation, simple imprisonment for 3 months. If compensation is deposited, it shall be dispersed to the first respondent. The first revision petitioner shall appear before Judicial First Class Magistrate-1, Ernakulam for undergoing the modified sentence, failing which the trial Magistrate shall issue non-bailable warrant forthwith. Since the company is non est, no separate sentence is awarded for the second revision petitioner.

Sd/-
P.D. RAJAN,
JUDGE

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P.A. TO JUDGE